

# THE REFUGEE LAW READER

**Editor-in-Chief**

Rosemary Byrne

**CASES, DOCUMENTS, AND MATERIALS**

## **Editorial Board**

Bhupinder Chimni

Maryellen Fullerton

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Luis Peral

Jens Vedsted-Hansen



Hungarian Helsinki Committee



**FOURTH EDITION  
BUDAPEST – DUBLIN 2008**





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This is a printed version of the syllabus for The Refugee Law Reader, an on-line ‘living’ casebook ([www.refugeelawreader.org](http://www.refugeelawreader.org)). The Refugee Law Reader is a collaborative project among experts in the field that offers a fully developed course curriculum and access to over 10,000 pages of legal instruments, documents and specialist commentary.

The Refugee Law Reader has been designed to easily adapt to the wide range of teaching and research needs of professionals. This booklet aims to facilitate navigation within the web site and to assist in seeing the structure of the curriculum as a whole. It also seeks to assist users with the selective adaptation of the course structure and access to the extensive legal material available in The Reader.



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# ABOUT THE READER AND ITS USE

## About the Reader

January 2008

*The Refugee Law Reader: Cases, Documents and Materials* (4th edn.) is a comprehensive on-line model curriculum for the study of the complex and rapidly evolving field of international refugee law. It was initiated and is supported by the Hungarian Helsinki Committee and funded by the European Refugee Fund and the United Nations High Commissioner for Refugees (UNHCR).

The Reader is aimed for the use of professors, lawyers, advocates, and students across a wide range of national jurisdictions. It provides a flexible course structure that can be easily adapted to meet a range of training and resource needs. The Reader also offers access to the complete texts of up-to-date core legal materials, instruments, and academic commentary. In its entirety, the Refugee Law Reader is designed to provide a full curriculum for a 48-hour course in International Refugee Law and contains over 600 documents and materials.

## Structure and Content

The Reader is divided into four sections: Introduction to International Refugee Law, The International Framework for Refugee Protection, The European Framework for Refugee Protection, and UNHCR and Other Actors Relevant to International Asylum Law. Each section contains the relevant hard and soft law, the most important cases decided by national or international courts and tribunals and a carefully selected set of academic commentaries.

To facilitate teaching and stimulate critical discussion, the Editors highlight the main legal and policy debates that address each topic, as well as the main points that should be drawn from the assigned reading. In many sections of the syllabus, readers may also access Editor's Notes, which contain more detailed commentary and suggestions for teaching in a given subject area.

The current content of the Reader is reflective of its initial objective, which was to provide teaching and resource materials for universities in Central and Eastern Europe and neighbouring regions. Because of the depth, scope, and flexibility of the Reader, it is now being accessed in several continents for the teaching and training of refugee law by over 20,000 users. Because of its extensive use across the world, the editorial board now is engaged in the task of expanding and 'universalizing' The Reader. The Fifth Edition, which will be launched towards the end of 2008, will introduce new regional legal sections focusing on Latin America, Africa, and Asia. Alongside the English language publication, adapted language editions will be launched in French, Russian, and Spanish. The Editorial Board hopes that with these new developments, the Reader can move towards an effective regional approach to refugee legal education that will overcome language and geographical barriers and can effectively serve a larger community of asylum experts worldwide.

The Reader first deals with the international refugee law regime and its foundations: the 1951 Geneva Convention Relating to the Status of Refugees, the expanding mandate of UNHCR and regional developments which have a bearing on the universal perception of the rights and duties of forced migrants. The concepts and the processes are analysed in light of the formative hard and soft law documents and discussed in an up-to-date, high standard, detailed academic commentary. Issues underlying the global dilemmas of refugee law are tackled, taking into account

developments in related areas of human rights and humanitarian law, as well as research advances in the field of migration.

In addition to the examination of the classic problematique of international refugee law, the Reader also focuses on the European Framework for Refugee Protection. The Editors share the view that the developments within the Council of Europe and the European Union are critical for lawyers in both Member and Non-Member States. For many countries bordering the current and future European Union, their asylum policies in turn will, for better or for worse, be responding to, and often replicating elements of Western European asylum policy.

The evolution of the asylum regime in Europe, however, has broader ramifications well beyond the regional context described above, making it relevant to a much wider community of international legal scholars and advocates. For the institutional and political fora of the European Union, the detailed pan-European asylum system that is under construction is creating regional norms and standards in the area of asylum that have been, and will continue to be, looked to by policy makers from other continents. For those reasons, the Reader offers a serious consideration of the European context for refugee protection. It also provides an excellent collection of the central instruments that are shaping regional law and policy. They are current up until December 2007.

While we have attempted to design the Reader so that users across jurisdictions, and with varying objectives, can select their own focus for the material, it is important that central themes of the Reader should not be discarded in this a la carte approach to refugee law.

Prior to the launch of the adapted language editions of The Reader, a translated syllabus of the English edition will be made available on-line. The Reader syllabus has been translated into Spanish (downloadable in a PDF format), and French and Russian translations will be following soon.

## Accessing Source Material

Over 80 per cent of the documents and materials contained in the Reader are accessible in their full text format to all users. For practical purposes, we have limited all assigned reading to English language materials.

The Reader uses James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) and G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007) as core texts. The Reader is able to provide open and full access to the assigned pages of *The Law of Refugee Status*. While it is likely that many university professors and students will have access to the Goodwin-Gill and McAdams 2007 third revised edition of *The Refugee in International Law* in their libraries or university bookshops, the Editors are aware that many of our users may not. These users, however, will still benefit from full access to the text of the assigned reading from the second edition of Goodwin-Gill's *The Refugee in International Law* (Oxford: Oxford University Press, 1996). Hence, the Editors have included parallel citations for the 3rd and 2nd editions of *The Refugee in International Law* throughout The Reader to ensure that all can follow the core readings in the syllabus regardless of resources. The Editorial Board and the Hungarian Helsinki Committee would like to thank the authors and Oxford University Press for their invaluable support for making refugee legal education accessible across the globe.

With the very generous support of the publishers of the secondary literature that is included in the Reader, we are able to provide the professors teaching refugee law and clinics in Central and Eastern Europe and other developing regions with password-protected access to these documents. Other users who are engaged in teaching and training refugee law in a university or clinical context may also be eligible for a password to access



protected materials. More information can be obtained by contacting the Hungarian Helsinki Committee at the email listed at the bottom of the page. As there are a large number of core and extended readings that are accessible in the Reader, we recommend that the reading should only be selectively printed out. Professors may wish to assign their students segments of the assigned readings, and many of the documents, and particularly lengthy legal instruments, can be effectively reviewed on-line.

One of the significant advantages of an on-line Reader is that it is able to provide access to instruments, documents and cases in their entirety, offering a rich source of material for academic writing. It should be noted that for purposes of citation, the process of downloading articles in PDF format does not always translate the page numbers of the original publication. Hence, please consult the full citation that appears in the syllabus to ensure accuracy.

## **Adapting the Reader to Specific Course Needs**

Editorial recommendations for how class time should be allocated to cover each of the respective subject areas, and their sub-topics, are provided below for a 48- hour course, as well as 24- and 12-hour modules. A copy of the complete syllabus can be downloaded and adapted for teaching purposes. Each of the sections of the complete syllabus, and their respective sub-topics can be directly accessed on the site. In the chart below, each of the major topics included in the syllabus are presented. The full text of the syllabus and the relevant source material for the assigned readings can be accessed in The Reader. For more detailed directions, see the section Technical Advice below.

### *Recommended hours for module teaching*

Topic	48-hour course	24-hour course	12-hour course
Section I			
Introduction to Refugee Law	5	2	1
Section II			
Principles/Concepts of Refugee Law	5	2	1
The 1951 Convention	14	8	4
Other Forms of Protection	4	2	1
Section III			
European Framework for Refugee Protection – Council of Europe	5	2	1
European Framework for Refugee Protection – European Union	12	6	3
Section IV			
UNHCR and Other Actors	3	2	1

## **Technical Advice**

To begin, you are advised to download the complete Syllabus of the Refugee Law Reader. The complete Syllabus provides you with both a general and a detailed overview of the Reader's structure and the documents included therein. The PDF format enables you to easily print out the Syllabus and use it as a general reference document. You can create your own syllabus or list of readings by simply copy-pasting the relevant citations into your own word processing system – the PDF format will ensure that the original form of the Syllabus remains unmodified.

To access a specific section of the Refugee Law Reader, click on the relevant section titles and subtitles in the left hand menu. The accompanying section of the Syllabus will then appear on the screen followed by the list of downloadable documents. Most of the documents

are easily available in PDF format by simply clicking on the small PDF icon under the title of the chosen document.

The vast majority of the Reader's documents are freely downloadable; however, some documents require authorization (a password) and are limited to professors and students in Central and Eastern Europe and other developing regions. Requests for password by other users are examined on an individual basis. As the publisher of the Refugee Law Reader, the Hungarian Helsinki Committee strives to make all materials as widely available as possible, and it negotiates with international publishing houses every year to expand the circle of beneficiaries.

If you wish to identify documents by publisher, author, or title, you can do so easily by using the search engine of the Refugee Law Reader. For further guidelines on how to search the Reader, please consult the relevant text available on the search website.

## Acknowledgments

*Each edition of The Reader expands upon the contributions of prior editors. This is particularly the case with members of the editorial board who were involved in the creation and development of the first three editions. We would like to thank:*

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## Reader Feedback

One of the advantages of producing an on-line resource is the editorial capacity to update and review materials at more frequent intervals than published texts would allow. For this purpose, we would like to encourage you to send the Editors any suggestions that they may have for improving the Reader.

We would also like to include current case law as it develops within, and beyond, the current Member States. If you are aware of important jurisprudence that is available in English, French, Russian or Spanish, we would be very appreciative if this could be brought to our attention.

*Please send any correspondence to the editorial board at:*

**HUNGARIAN HELSINKI COMMITTEE**

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**E-mail: [reader@larc.info](mailto:reader@larc.info)**

# SECTION I

## Introduction to International Refugee Law: Background and Context

### 1. History of Population Movements: Migrants, Immigrants, Internally Displaced Persons and Refugees

#### Main Debates

Is there a Human Right of Freedom to Move to Another Country?

Is Migration an Asset to, or a Burden for, Sending and Receiving States?

What is the Relationship between Past Movements and Present Migration Policies?

#### Main Points

Unlimited Exit v. Limited Entry Rights

Impacts of Regular and Forced Migration:

Migration as a Pervasive Feature of the Human Experience

#### **a. The Concepts**

#### Main Debates

Regular, Illegal, and Forced Migration:

Should Different Types of Migration be Subject to Different Forms of Control?

#### Main Points

Sociological, Demographic, Historical and Legal Perspectives on Migration

Understanding Fundamental Terms of Reference:

International Migrant

Asylum seeker

Refugee

Illegal Migrant

'Of Concern' to UNHCR

## Readings

### Core

- A. Demuth, 'Some Conceptual Thoughts on Migration Research' in B. Agozino (ed.), *Theoretical and Methodological Issues in Migration Research* (Aldershot: Ashgate Publishing, 2000), 21–58.

## **b. The Theories**

### Main Debates

What are the Causes of Migration?

Is the Model of Push-Pull Factors Adequate?

Can Migratory Processes be Managed?

Does Migration Management Simply Redirect or Reclassify Migrants?

### Main Points

Absence of a Single Theory Explaining Migration

The Start and the Continuation of a Migratory Process May Have Different Causes

Migration Management:

- Varied Tools
- Short v. Long Term Perspectives
- Often Unexpected Results

## Readings

### Core

- D. Massey, J. Arango, G. Hugo, A. Kouaci, A. Pellegrino, and E. Taylor, 'Theories of International Migration: A Review and Appraisal' *Population and Development Review*, vol. 19, no. 3 (September 1993), pp. 431–466.
- A. Pécoud, P. de Guchteneire, 'Migration without Borders: An Investigation into the Free Movement of People', *Global Migration Perspectives*, No. 27, (Geneva: Global Commission on International Migration, 2005).
- A. Zolberg, 'Matters of State: Theorizing Immigration Policy', in C. Hirschman, P. Kasinitz, and J. DeWind (eds), *The Handbook of International Migration: The American Experience* (New York: Russell Sage Foundation, 1999), pp. 71–93.



### Extended

D. Fisher, S. Martin and A. Schoenhotz, 'Migration and Security in International Law', in T. Aleinikoff and V. Chetail (eds), *Migration and International Legal Norms* (The Hague: Asser Press, 2003), pp. 87–122.

### Editor's note

*As the reading demonstrates, there is no single theory of migration. Theories of international migration attempt to explain migration at different levels (i.e., ranging from the individual, family, or community, to the national and global) and focus on various aspects of migration (i.e., forces that “trigger” migration or factors that sustain it). Even the most widely held convictions – about the sovereign right and the economic incentives to exclude the foreigners – may be challenged.*

## **c. The Actual Movements**

### Main Debates

Is the Boat Really Full? Where?

Should Former Countries of Origin 'Repay' their Historic Debts by Receiving Migrants?

Does Europe Need an Immigration Policy?

### Main Points

Transformation of European States from Sending to Receiving States

Absolute Number and Relative Proportion of Immigrants in Europe is Statistically Small

Lessons from Historical Data:

- Closing One Entry Door Leads to Opening of Another
- Migration Cannot be Halted

### Readings

#### Core

J. Salt, *Current Trends in International Migration in Europe* (Strasbourg: Council of Europe CDMG, 2005), p. 2.

A. Segal, *An Atlas of International Migration* (London: Hans Zell Publishers, 1993), pp. 3–22.

### Extended

- R. King, 'European International Migration 1945–1990: a Statistical and Geographical Overview', in R. King (ed.), *Mass Migration in Europe the Legacy and the Future* (New York: John Wiley and Sons, 1995), pp. 19–39.
- S. Schmeidl, 'Comparative Trends in Forced Displacement', in J. Hampton (ed.), *Internally Displaced People A Global Survey* (London: Earthscan, 1998), pp. 24–33.
- EUROSTAT, *EUROSTAT Yearbook* (2005), pp. 73–78.
- OECD, SOPEMI, *Trends in International Migration* (Paris: OECD, 2005).
- UNHCR, 'Refugees, Asylum-seekers, and others of Concern – Trends in Displacement, Protection and Solutions', in *UNHCR Statistical Yearbook* (2003).

### Editor's note

*An historical overview of migration should place a particular emphasis on post-Second World War patterns, highlighting the changes in migration policies that encouraged inward migration until the late 1970s.*

*Explication of trends and patterns in refugee migration should identify the changing numbers of refugees, their countries of origin, and the uneven distribution of asylum seekers among host countries.*

## **2. The Legal and Institutional Framework for Refugee Protection**

### Main Debates

National Sovereignty, Migration Control, and International Obligations

Legal v. Moral Duties of Host States

For Better or for Worse: Expanding Refugee Definitions and the Rise of New Actors

### Main Points

Three Major Phases of the Evolution of the International Refugee Legal Regime

Policy Responses to Different Types of Migration

Universal and Regional Definitions

## **a. The Evolution of the International Refugee Regime**

### Readings

#### Core

- J. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law', *Harvard International Law Journal*, vol. 31, no. 1 (Spring 1990), pp. 129–147.
- G. Loescher, 'The Origins of the International Refugee Regime', in *Beyond Charity: International Co-operation and the Global Refugee Crisis* (Oxford: Oxford University Press, 1993), pp. 32–55.
- A. Suhrke, 'Refugees and Asylum in the Muslim World', in R. Cohen (ed.), *The Cambridge Survey of World Migration*, (Cambridge: Cambridge University Press, 1999), pp. 457–460.

#### Extended

- L. Holborn, 'The Legal Status of Political Refugees, 1920–1938', *American Journal of International Law*, vol. 32, no. 4 (October 1938), pp. 680–703.
- M. Marrus, *The Unwanted. European Refugees in the Twentieth Century* (Oxford: Oxford University Press, 1985).

#### Editor's note

*Note the three phases of the modern international refugee regime:*

- 1. The first phase of collective recognition of refugees, which goes up until the Second World War,*
- 2. The second phase of transition, which occurs during and shortly after the Second World War,*
- 3. The third phase of individual recognition and other forms of protection, which begins with the establishment of UNHCR and entry into force of the 1951 Convention, continuing to the present.*

## **b. The Universal Standard: the 1951 Geneva Convention Refugee Definition and the Statute of the UNHCR**

### Treaties

#### International

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.  
Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

#### Soft Law

Statute of the Office of the United Nations High Commissioner for Refugees,  
UN General Assembly Resolution, A/RES/428 (V), 14, 14 December 1950.

### Readings

#### Core

N. Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, (New York: Institute of Jewish Affairs, 1953).

#### Editor's note

*For detailed analysis see also Section II.2*

*This section traces the recent broadening of the refugee definition and the expansion of major actors (governmental and non-governmental) that has occurred from early 1970s onwards. While the 1951 Geneva Convention provides the core legal definition of "refugee" and UNHCR remains the dominant actor in international refugee protection, readers should consider whether the appearance of new definitions undermines the consistency of the regime or leads to a more responsive international environment.*

## **c. Contemporary Alternative Refugee Definitions**

### **i. Africa**

#### Treaties

#### Regional

Convention Governing the Specific Aspects of Refugee Problems in Africa,  
10 September 1969, 1001 U.N.T.S. 45.

## ii. Latin America

### Soft Law

Cartagena Declaration on Refugees, 22 November 1984, OAS/Ser.L./V/II.66, doc. 10, rev. 1.

## iii. Europe

### Soft Law

Council of Europe Parliamentary Assembly, 'Recommendation 773 (1976) on the Situation of de facto Refugees', 26 January 1976.

### EU Documents

Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted, OJ L 304, 30 September 2004.

## **d. Institutions and Actors in International Law Relevant to Refugee Protection**

### UNHCR Documents

UNHCR, 'Refugee Protection: A Guide to International Refugee Protection', December 2001, Ch. 2.

### Editor's note

See UNCHR's website on Donors and partners of UNHCR.

See also Section IV.

### **3. Overview of National Legal Framework, Institutions, and Actors**

#### **a. The Interface Between International Law and National Law**

##### Readings

##### Core

P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), pp. 63–71.

#### **b. Comparing National Systems**

##### Readings

##### Core

F. Liebaut (ed.), *Legal and Social Conditions for Asylum Seekers and Refugees in Western European Countries* (Copenhagen: Danish Refugee Council, 2000).  
UNHCR, 'Reception Standards for Asylum Seekers In the European Union' July 2000.

##### Extended

J.Y. Carlier, D. Vanheule, K. Hullmann, and C. Pena Galiano (eds), *Who Is a Refugee? A Comparative Case Law Study* (The Hague: Kluwer, 1997).

## SECTION II

### International Framework for Refugee Protection

#### 1. Principles and Concepts of Refugee Protection

##### Main Debates

The Scope of Beneficiaries – Adequacy of the Convention Refugee Definition

Duration of Protection – For How Long is a State Legally Obligated to Protect Refugees?

Temporary Protection v. Durable Solutions

Human Rights Protection v. Migration Control

Asylum v. Extradition and other Criminal Law Measures

Implications of Extraterritorial Policies as an Alternative or a Threat to Asylum

##### Main Points

International Refugee Protection as a Surrogate to National Protection, Resulting from the Failure of the State to Protect Human Rights

Non-refoulement and Different Forms of Asylum

Standards of Protection and Refugee Rights

Increasing Importance of Core International Human Rights Instruments for Refugee Protection

#### **a. Asylum**

##### Soft Law

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948, Art. 14.

Declaration on Territorial Asylum, UN General Assembly Resolution, A/RES/2312 (XXII), 14 December 1967.

##### UNHCR Documents

UNHCR, 'Agenda for Protection', October 2003.

### Readings

#### Core

A. Edwards, 'Human Rights, Refugees, and the Right "To Enjoy" Asylum', *International Journal of Refugee Law*, vol. 17, no. 2 (2005), pp. 293–330.

#### Extended

G. Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', *International Journal of Refugee Law*, vol. 17, no. 3 (2005), pp. 542–573.

#### Editor's note

See also Sections II.1.b. and II.1.c.

Cf. 1951 Convention Arts. 32, 33.

## **b. Non-refoulement**

### Treaties

#### International

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Art. 3.

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Art. 33.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

#### Soft Law

UNHCR EXCOM, 'Non-refoulement', Conclusion No. 6 (XXVIII), 1977.

### UNHCR Documents

UNHCR, 'Note on International Protection', 7 September 1994, paras. 14–15, 30–41.

### Readings

#### Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 201–267. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 117–155].



- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 24–27.
- E. Lauterpacht and D. Bethlehem, ‘The Scope and Content of the Principle of Non-refoulement’, in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp.78–177.

### Readings

#### Extended

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 268–277. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 155–171, 195–204].

## **c. Non-discrimination**

### Treaties

#### International

- Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Art.3.
- Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 513.
- Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195.
- Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.
- International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.
- Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

### Readings

#### Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 446–450. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 230–234].

### Extended

- T. Einarsen, 'Discrimination and Consequences for the Position of Aliens', *Nordic Journal of International Law*, vol. 64, no. 3 (1995), pp. 429–452.
- M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Strasbourg: NP Engel, 1993), pp. 43–53, 465–479.

## **d. Family Unity**

### Treaties

#### International

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Arts. 17, 23.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

### Soft Law

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 U.N.T.S. 37, 1951, Section IV B on the Principle of the Unity of the Family.

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 181–188.

UNHCR EXCOM, 'Family Reunion' Conclusion No. 9 (XXVIII), 1977.

UNHCR EXCOM, 'Family Reunification' Conclusion No. 24 (XXXII), 1981

### UNHCR Documents

UNHCR, 'Agenda for Protection', October 2003.

UNHCR, 'UNHCR Guidelines on Reunification of Refugee Families', July 1983.

UNHCR, 'Global Consultations on International Protection, Geneva Expert Round Table', 8–9 November 2001.

### Readings

#### Core

- K. Jastram, and K. Newland, 'Family Unity and Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International*

*Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 555–603.

Editor's note

See Section II.3.a.iii (*Convention on the Rights of the Child*).

See also Section III.1.b (*case-law under ECHR Art. 8*).

## **e. Durable Solutions**

UNHCR Documents

UNHCR, 'Handbook Voluntary Repatriation: International Protection', 1996, pp. 7–40.

UNHCR, 'Agenda for Protection', October 2003, pp. 68–75.

Readings

Core

D. Anker, J. Fitzpatrick and A. Shacknove, 'Crisis and Cure: A Reply to Hathaway/Neve and Schuck', *Harvard Human Rights Journal*, vol. 11 (Spring 1988), p. 295.

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 489–501. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 268–282].

J. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Coll ectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol. 10 (Spring 1997), pp. 155–169, 173–187.

Editor's note

See Section II.2.j (*cessation of refugee status being one of the durable solutions as foreseen by the 1951 Refugee Convention*).

## **f. International Cooperation**

### Readings

#### Core

- B.S. Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems', *Refugee Survey Quarterly*, vol. 23, no. 3 (October 2004), pp. 55–73.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 502–505. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 291–295].
- J. Hathaway and R. A. Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection', *Harvard Human Rights Journal*, vol. 10 (Spring 1997), pp. 115–151, 187–209.

#### Extended

- A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 2002), pp. 40–54, 72–87.

#### Editor's note

See Section IV.

## **2. The 1951 Geneva Convention**

### **a. Historical Context**

#### Main Debates

- Relationship Between the Strategic Political Objectives of Western States in 1951 and the Scope of the 1951 Geneva Convention Definition
- Does the Focus on Civil and Political Rights in the 1951 Geneva Convention Definition Offer an Adequate Understanding of the Need for International Protection?

### Main Points

The Evolution of the Refugee Definition from:

- A Historical Context
- Juridical to Social to Individualist Perspectives
- The Specific to the Universal

1951 Geneva Convention Refugee Definition v. Other Contemporary Definitions

### Readings

#### Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths 1991), pp. 1–11.

#### Editor's note

*It is instructive to identify and analyse the refugee definitions in international instruments between 1922 and 1946 in comparison to that of the 1951 Geneva Convention.*

*It is useful to identify the values (civil and political rights) highlighted in the 1951 definition and those that are not (social and economic rights) as a means of generating a broader discussion about the wisdom, practicality, and political implications of the choices made in adopting the 1951 Geneva Convention definition.*

## **i. Prior Definitions: Group Specific; Geographically and Temporally Limited**

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 1–4.

### Readings

#### Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 15–20. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 4–6].

## ii. 1951 Geneva Convention: Universal Applicability; Optional Geographical and Temporal Limits

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Geneva Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 5, 108–109.

### Readings

#### Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 20–24, 35–37. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 7–8, 18–19].

## iii. Expansion via the 1967 Protocol

### Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150. Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 6–11.

## **b. Definition**

### Main Debates

Interpretive Method: Original Intent v. Evolving Interpretation – Should There Be a “Fixed” or “Expanding” Meaning?

Re-Defining Refugee: Controversies over Expanding the Definition to Meet Protection Needs Not Foreseen in 1951.

### UNHCR Documents

UNHCR, 'The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001.

### Editor's note

*A discussion of whether the definition of refugee should be modernized should consider whether gender, sexual orientation, or other characteristics should be added to the enumerated grounds of persecution.*

*See Section III.2.b.ii (b) Joint Position 4 March 1996 of the Council of the European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the 1951 Geneva Convention of 28 July 1951 Relating to the status of refugees (96/1961/JHA).*

*See Section III.2.b.ii (b) Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted.*

## **i. Alienage**

### Main Debates

Requirement that Refugees Be Outside of their State of Nationality v. Need for Protection

Should the Internally Displaced Receive Refugee Protection?

### Main Points

1951 Geneva Convention Applies to a Subset of Forced Migrants

Underlying Legal and Practical Motivations of State Parties for Requirement that Refugees Cross International Borders

UNHCR v. State Party Views on International Protection Needs: UNHCR Assists to IDPs

### Readings

#### Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 29–33.

A. Shacknove, 'Who Is a Refugee?', *Ethics*, vol. 95, no. 2 (January 1985), p. 274.

### Editor's note

*In 1951, the conceptual scope of international law was much more limited than it is today. Many then viewed international law as limited to duties between states that lacked the competence to impose duties on states regarding their own nationals.*

*There is also a sort of common sense notion that those who are outside of their own borders and fear persecution by authorities within their own state are quite clearly and visibly in need of international protection. The requirement that individuals must be outside their own state in order to qualify as a refugee accomplished multiple goals:*

- (1) It reduced the number of forced migrants that the international community needed to address.*
- (2) It prevented states from shifting responsibility for large parts of their own populations to the international community.*
- (3) It prevented states from violating the territorial sovereignty of other states on the pretext of responding to a refugee problem.*
- (4) It furnished a prominent example of the limited reach of international legal obligations and duties.*

### *(a) Outside the Country of Nationality*

#### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 87–91.

### *(b) Owing to Fear Is Unable or Unwilling to Avail Self of Protection of Country of Nationality*

#### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 97–100.



### (c) *Dual or Multiple Nationality*

#### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 106–107.

### (d) *Stateless*

#### International Treaties

Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117, 28 September 1954.

Convention on the Reduction of Statelessness, 989 U.N.T.S. 175, 30 August 1961.

#### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 101–105.

UNHCR Inter-parliamentary Union, '*Nationality and Statelessness: A Handbook for Parliamentarians*', (Switzerland: 2005).

Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution, A/RES/61/137, 25 January 2007.

UNHCR EXCOM, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons', Conclusion No. 106 (LVII) – 2006.

#### Readings

##### Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 67–70. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 41–43].

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 59–63.

## ii. Well-founded Fear

### Main Debates

The Well-founded Fear Requirement:

Demonstration of Objective v. Subjective Fears

### Main Points

Subjective v. Objective Fear

Interpretation by State Parties

Major Focus in Refugee Determinations is on the Risk of Future Persecution

Assessing the Risk of Persecution in the Future Cannot be Done in the Abstract

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 37–47.

### Cases

*R. v. Secretary of State for the Home Department ex parte Sivakumaran*, (1988) 1 All ER 193 (HL) (UK judicial decision analysing objective element)  
*INS v. Cardoza – Fonseca*, 480 US 421 (1987) (US judicial decision stating that one in ten probability of harm can constitute well-founded fear)

### Readings

#### Core

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 69–97. 'The Michigan Guidelines on Well-Founded Fear', March 2004.

#### Extended

J. Hathaway and W. Hicks, 'Is There a Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear?', *Michigan Journal of International Law*, vol. 26, no. 2 (Winter 2005), p. 505.

#### Editor's note

*Many State Parties interpret this term to require showings of both subjective and objective fear.*

*Debates surrounding the interpretation of the well-founded fear requirement centre upon whether there is a need to demonstrate two elements:*

*1) the asylum seeker's subjective emotion of fear and 2) the objective factors which indicate that the asylum seeker's fear is reasonable; or whether the inquiry should be solely the objective assessment of the situation, limiting protection only to those who objectively risk persecution.*

*Whether viewed as two elements or one, the major focus on showing a risk in the future must consider all the circumstances, the context and the conditions that have occurred in the past, and must evaluate the degree of likelihood of the actions and threats that might take place in the future.*

*N.B. Many commentators and tribunals confuse the discussions of subjective and objective elements of fear with concerns about credibility and consistency of the asylum seekers' narratives.*

*See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted and opened for signature, ratification and accession by UN General Assembly Resolution 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with Article 27 (1), Section 4).*

### **iii. Persecution**

#### Main Debates

Accountability Theory v. Protection Theory

Must Persecution Include Punitive Intent?

#### Main Points

Persecution by Non-State Actors

The Threshold for Persecution:

- Discrimination
- Prosecution under Laws of General Application
- Threats to Life, Liberty or Bodily Integrity without Punitive Intent (i.e., FGM)

#### Editor's note

*The debate between the accountability theory v. the protection theory centres upon whether refugee status is limited to those who fear persecution by groups for whom the*

state is accountable or whether it is available to those who need protection from all sources of persecution on account of the five enumerated grounds.

For EU definition, see Section III.2.b.ii (b) Joint Position 4 March 1996 of the Council of the European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA) and see Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, Art. 2–10, 13.

## (a) Acts of Persecution

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 51–60, 65.

### Cases

*New Zealand Refugee Status Appeals Authority*, (1999) [2000] NZLR 545, (Refugee Appeal No. 71427/99), paras. 43–53.

(NZ administrative decision using international law principles to interpret the term 'persecution')

*Independent Federal Asylum Senate*, (IFAS/UBAS) [Austria], Decision of 21 March 2002, IFAS 220.268/0-X1/33/00

(Austrian administrative appellate decision concluding that female genital mutilation constitutes persecution)

*Pitcherskaia v INS*, 118 F 3d 641 (9th Cir 1997) (US judicial decision holding that forced treatment in psychiatric institution without intent to punish can constitute persecution)

*Korablina v INS*, 158 F 3d 1038 (9th Cir 1998) (US judicial decision finding cumulative discrimination against Jewish woman in Ukraine constitutes persecution)

UK Court of Appeal *Adan and Aitseguer*, 23 July 1999 [1999] 3 WLR 1274 UK House of Lords *Regina v Secretary of State for the Home Department ex parte Adan*; *Regina v Secretary of State for The Home Department ex parte Aitseguer*,

Judgments of 19 December 2000), [2001] 2 WLR 143. (UK judicial decision upholding asylum for applicants fearing persecution by non-state actors)

### Readings

#### Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 90–94. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 66–70].
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 169–179.

### **(b) Agents of Persecution**

#### Soft Law

- UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, HCR/IP/4/Rev.1, 1979, para. 65.

#### UNHCR Documents

- UNHCR, ‘Position Paper on Agents of Persecution’, 14 March 1995.

### Readings

#### Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 98–100. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 70–74].
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 124–131.
- J. Moore, ‘Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection’, *International Journal of Refugee Law*, vol. 13, nos. 1-2 (January 2001), p. 32.
- V. Türk, ‘Non-State Agents of Persecution’ in: V Chetail and V Gowlland-Debbas (eds), *Switzerland and the International Protection of Refugees*, (The Hague: Kluwer Law International, 2002), pp. 95–109.

(c) *Five Grounds: Race, Religion, Nationality, Social Group, Political Opinion*

Main Debates

Flight from General Civil War: Can Violent Insecurity Give Rise to the Possibility of Persecution based upon the Specified Grounds?

Widespread Repressive Practices: What is the Relationship between the Individual and the Group?

Conscription: In What Circumstances Can Coerced Military Service Constitute Persecution?

Whose Political Opinion is Relevant: The Persecutor, the Persecuted or Both?

Main Points

Broad Interpretation of Concepts of Race, Religion and Nationality

Public Religious Activity v. Private Worship

Religious Objections to Military Service

Multiple Factors in Social Group Definition: Immutable Characteristics, Involuntary Associations, Shared Values, Voluntary Associations, Pariah Status

Social Groups and Gender-Related Persecution

Types of Expression of Political Opinion – Including Neutrality

Treaties

International

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Arts. 2, 12, 18, 19, 26, 27.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 U.N.T.S. 513.

Convention on the Elimination of All Forms of Racial Discrimination (CERD), 21 December 1965, 660 U.N.T.S. 195.

Regional

European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, Art.14.

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 66–86, 167–174.

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948., Arts. 2, 18, 19.

UNESCO, 'Four Statements on the Race Question', COM.69/II.27/A, 1969.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief, UN General Assembly Resolution, A/RES/36/55, 25 November 1981.

Declaration on the Elimination of Violence Against Women, UN General Assembly Resolution, A/RES/48/104, 20 December 1993.

### UNHCR Documents

UNHCR, 'Guidelines on International Protection: "Membership of a particular social group" within the context of Art.1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', May 2002.

UNHCR, "Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons" – Guidelines for Prevention and Response", May 2003.

UNHCR, 'Guidelines on International Protection: "Religion-Based Refugee Claims under Art. 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees"', April 2004.

### Cases

#### Core

*R. v. Immigration Appeal Tribunal ex parte Shah; Islam v Secretary of State for the Home Department*, (1999) 2 AC 629. (UK judicial decision holding Pakistani women accused of adultery feared persecution based on their social group)

*Matter of Acosta*, 20 Immigration & Nationality Decisions 211 (BIA 1985). (US administrative decision concerning group sharing common immutable characteristic)

*Matter of Kasinga*, 21 Immigration & Nationality Decisions 357 (BIA 1996). (US administrative decision recognising as a social group women who fear female genital mutilation)

*Aguirre-Cervantes v. INS*, 242 F 3d 1169 (9th Cir 2001). (US judicial decision granting asylum to a Mexican woman based on physical abuse by father)

*Bolanos-Hernandez v. INS*, 767 F 2d 1277 (9th Cir 1984). (US judicial decision holding neutrality in El Salvador can be a political opinion)

*Ciric and Ciric v. Canada*, 2FC 65 (1994). (Federal Court of Canada holding refusal to serve in Serbian army in 1991 constituted protected political opinion)

*Klinko v. Canada*, 184 (2000) DLR 4th 14. (Federal Court of Appeal of Canada holds that public complaints about widespread corrupt conduct can constitute political opinion)

*Chen Shi Hai (an infant) v. The Minister for Immigration and Multicultural Affairs*, (2002) 162 ALR 577. (Australian High Court holds child born in violation of the one-child policy faces persecution based on social group)

### Extended

Federal Administrative Court (German), 15 March 1988, 9 C 378.86, Volume 79, Collection of Decisions 143 (German judicial opinion recognising Iranian homosexual faces persecution based on social group)

*Ahmad and Others v Secretary of State for the Home Department*, (CA) (1990) Imm AR 61. (UK judicial decision on persecution of Ahmadiyas in Pakistan)

*Refugee Review Tribunal*, 7 July 1994 RRT Reference N93/01843. (Australian decision on persecution of Christians in China)

*Dobrican v. INS* 77, F 3d 164 (7th Cir 1996). (US judicial decision on religious objections to military service by Jehovah's Witness in Romania)

*Attorney General v. Ward*, [1993] 2 SCR 689 (Supreme Court). (Canadian judicial decision on social group)

*Metropolitan Court* (Hungary), 28 February 2000. (Judicial decision ordering new refugee procedure in order to analyse in depth Serbian draft evader)

*Metropolitan Court* (Hungary), 9 February 1999. (Judicial decision providing protection, but not refugee status, to ethnic Hungarian who disobeyed Yugoslav conscription order)

*Barraza-Rivera v. INS*, 913 F2d 1443 (9th Cir 1990). (US judicial decision holding that desertion from Salvadoran military in 1984 to avoid assassination duty constituted protected political opinion)



*Guo Chun Di v. Carroll*, 824F Supp 858 (ED Va 1994). (US judicial opinion finding opposition to China's population control policy is political opinion)

### Readings

#### Core

- T. Aleinikoff, 'Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group" Determination' in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 263–311.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 70–90, 104–116. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 43–49, 54–59].
- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 141–185.
- K. Schnöring, 'Deserters in the Federal Republic of Yugoslavia', *International Journal of Refugee Law*, vol. 13, nos. 1–2 (January 2001), p. 153.
- Canadian Immigration and Refugee Board, 'Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations' (1996) (neutrality and imputed political opinion).

#### Extended

- K. Daley and N. Kelley, 'Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence', *International Journal of Refugee Law*, vol. 12, no. 2. (April 2000), p. 148.
- M. Fullerton, 'A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group', *Cornell International Law Journal*, vol. 26, no. 3 (1993), pp. 514–522, 531–552, 561–563.
- M. Fullerton, 'Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany', 4 *Georgetown Immigration Law Journal*, vol. 4, no. 3 (1990), pp. 396–442.

#### Editor's note

*It should be noted that many forms of persecution may be related to overlapping grounds under Article 1.*

*It may be useful to think about the scope of protected activities under the 1951 Geneva Convention:*

- *Religion: Does, or should, it include non-traditional religious beliefs? Anti-religious beliefs? Satanism?*
- *Political opinion: Does, or should, it include racist or anti-semitic political statements?*
- *Gender-related persecution and persecution based on sexual orientation: Tends to be viewed as issues of social group – may also implicate religious grounds as well as political opinion. See Section 2.c.i. for further resources concerning gender-related persecution.*
- *Persecution related to military conscription: Tends to be viewed as issues of political opinion, but may also implicate religious grounds.*

## **c. Groups with Special Needs**

### Treaties

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 U.N.T.S. 513.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

### Editor's note

*It is desirable to stress the impact that the elements of the Convention definition have on women, children, and the elderly throughout the examination of most of the topics covered in the Reader.*

*Special needs of individuals can have a great impact both on access to the asylum procedure and on standards of treatment.*

## **i. Women**

### Main Debates

Are Women, as a Majority of the Population, a Social Group Under the 1951 Convention?

Do Laws or Harsh Customs Imposed Upon Women Warrant International Protection?

### Treaties

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 18 December 1979, 1249 U.N.T.S.513.

### UNHCR Documents

UNHCR 'Guidelines on the Protection of Refugee Women', July 1991, paras. 57–62.

UNHCR, 'Guidelines on Prevention and Response to Sexual and Gender Based Violence', May 2003.

UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 39 (XXXVI), 1985.

UNHCR EXCOM, 'Refugee Women and International Protection', Conclusion No. 64 (XLI), 1990.

UNHCR EXCOM, 'Refugee Protection and Sexual Violence', Conclusion No. 73 (XLIV), 1993.

### Cases

#### Core

*R. v. Immigration Appeal Tribunal ex parte Shah; Islam v Secretary of State for the Home Department*, (1999) 2 AC 629. (UK judicial decision holding Pakistani women accused of adultery feared persecution based on their social group)

*Matter of Kasinga*, 21 Immigration & Nationality Decisions 357 (BIA 1996). (US administrative decision recognising as asocial group women who fear female genital mutilation)

*Aguirre-Cervantes v. INS*, 242 F 3d 1169 (9th Cir 2001). (US judicial decision granting asylum to a Mexican woman based on physical abuse by father)

#### Extended

*Matter of S-A*, Interim Decision 3433 (BIA 2000) (US administrative decision granting asylum to Moroccan woman based on physical and emotional abuse by father)

*In re JJ*, Immigration Court York, PA 10 April 2001, Judge Van Wyke. (US administrative decision granting asylum to Spanish Roma fearing forced return to abusive marriage)

## Readings

### Core

- D. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm', *Harvard Human Rights Journal*, vol. 15 (Spring 2002), pp. 133–154.
- R. Haines, 'Gender-Related Persecution', in E. Feller and V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 319–350.

### Extended

- H. Crawley and T. Lester, 'Comparative Analysis of Gender-related Persecution in National Asylum Legislation and Practice in Europe', *UNHCR Evaluation and Policy Analysis UnitEPAU/2005/05*, (May 2004).
- A. Macklin, 'Cross Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-related Asylum Cases', *Georgetown Immigration Law Journal*, vol. 13, no. 1 (Fall 1998), pp. 25–71.
- UK Immigration Appellate Authority, 'Asylum Gender Guidelines', November 2000.
- T. Spijkerboer, *Gender and Refugee Status*, (Dartmouth and Aldershot: Ashgate, 2000), pp. 107–132, 172–182, 189–206.
- 'Asylum and Withholding Definitions', *Federal Register*, 65 (7 December 2000): 76588–76598 (US proposed rule on gender and domestic violence asylum claims) Australian Dept. of Immigration and Multicultural Affairs, 'Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers', July 1996.
- Canadian Immigration and Refugee Board, 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution', March 1993.
- UK Immigration Appellate Authority, 'Asylum Gender Guidelines', November 2000.

### Editor's note

*See Section II.2.b.iv for resources concerning gender-related persecution and its intersection with persecution based on membership in a particular social group.*

## ii. Children

### Main Debates

How Should Asylum Systems Adapt to Respect the ‘Best Interests of the Children’  
Child Soldiers: Should They Be Excluded or Protected?

### Main Points

Large Number of Unaccompanied Children Seeking Asylum

State Guidelines

Need to Take Account of Youth, Immaturity, and Special Needs

### Treaties

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

### UNHCR Documents

UNHCR, ‘Refugee Children: Guidelines on Protection and Care’, 1994.

UNHCR, ‘Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum’, February 1997.

UNHCR EXCOM, ‘Refugee Children’, Conclusion No. 47 (XXXVIII), 1987.

UNHCR EXCOM, ‘Refugee Children’, Conclusion No. 59 (XL), 1989.

UNHCR EXCOM, ‘Refugee Children and Adolescents’, Conclusion No. 84 (LXVIII), 1997.

### Readings

#### Core

Save the Children and UNHCR, ‘Separated Children in Europe Programme “Statement of Good Practice”’, October 2004.

Save the Children and UNHCR, ‘Separated Children in Europe Programme “Returns and Separated Children”’, September 2004.

#### Extended

S. Maloney, ‘Transatlantic Workshop on ‘Unaccompanied/Separated Children: Comparative Policies and Practices in North America and Europe’, *Journal of Refugee Studies*, vol. 15, no. 1 (March 2002), pp. 102–119.

Immigration and Refugee Board (Canada), ‘Child Refugee Claimants: Procedural and Evidentiary Issues’, 30 September 1996.

### Editor's note

*NB: There is controversy around claims submitted by child soldiers, who may be denied protection based upon acts they performed under orders.*

*See also Section II.3.a.iii for resources concerning child refugees and Section III.2.b.i. (a) Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries, OJ C 221, 19 July 1997.*

## **iii. Elderly**

### UNHCR Documents

UNHCR, 'The Situation of Older Refugees', August 1998.

UNHCR, 'Older Refugees: Looking Beyond the International Year of Older Persons', February 2000.

## **d. Exclusion from Convention Refugee Status**

### Main Debates

Exclusion v. Protection for Conscripts Acting under Superior Orders  
Should Different Exclusion Criteria Apply to Child Soldiers?

### Main Points

Already Receiving Protection  
Undeserving of International Protection  
War Crimes and Coercion: Child Soldiers

### Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150., Articles 1.D, 1.E, 1.F, and Annex VI.  
Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.  
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.S. 280, Art. 6.

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 140–163.

### UNHCR Documents

UNHCR, 'Guidelines on International Protection. Application of the Exclusion Clauses (Article 1 F of the 1951 Convention)', September 2003.

### Cases

*Refugee Review Tribunal, RRT Reference N96/12101*, 25 November 1996 (Australian administrative decision ruling that asylum seeker from Liberian rebel group that committed many atrocities should not be excluded because he acted under duress)

*Moreno v. Canada*, 107 D.L.R. 4th 424 (1993) (forcibly conscripted teenage Salvadoran present at torture of prisoners not excluded)

*Zacarias Osorio Cruz*, Immigration Appeal Board Decision, M88-20043X CLIC Notes 118.6 25, March 1988 (Canada) (Mexican army deserter who reported political executions was not excluded, despite his participation in killings)

### Readings

#### Core

G. Gilbert, 'Current issues in the application of the exclusion clauses' in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 425–478.

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 421–446. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 205–229].

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 91–114.

#### Extended

M. Gallagher, S.J., 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum' *International Journal of Refugee Law*, vol. 13, no. 3 (2001), p. 310.

- J. Hathaway, 'Framing Refugee Protection in the New World Disorder', *Cornell International Law Journal*, vol. 34, no. 2 (2001), pp. 257–320.
- B. Saul, 'Exclusion of Suspected Terrorists from Asylum: Trends in International and European Refugee Law', Institute for International Integration Studies, Discussion Paper, no. 26, July 2004.

#### Editor's note

*Some claimants are excluded because they are already receiving protection from other UN agencies, such as UNRWA. Those claimants residing in another state with the rights and obligations of a national of that state are also excluded. Others are excluded because they are deemed unworthy of protection having committed:*

- 1) serious non-political crimes*
- 2) crimes against peace, war crimes, or crimes against humanity*
- 3) acts contrary to the purposes of the UN*

## **e. Internal Protection Alternative**

#### Main Debates

Internal Flight Alternative v. Internal Protection Alternative

Should Barriers to Access to Protection and to Secure an Existence Matter?

Who has the Burden of Proof?

#### Main Points

Absence of Persecution in One Region v. Access to Genuine Protection

Factors that Affect Practical Access to Protection Elsewhere Within Country of

Origin: Logistical, Linguistic, Familial, Financial, etc.

#### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, para. 91.

#### UNHCR Documents

UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', July 2003.



### Cases

*New Zealand Refugee Appeal*, No. 71684/99 of 29 October 1999 (decision of the Refugee Appeals Authority adopting the IPA principles of Michigan Guidelines)

*Rasaratnam v. Canada*, F.C.J. No. 1256 of 1990 (Canadian Court of Appeal decision holding that IPA requires no possibility of persecution in area of potential relocation rather than not unreasonable to seek refuge there)

*Duzdkiker v. Minister for Immigration and Multicultural Affairs*, FAC 390 of 2000 (Australian Federal Court decision applying IPA test of real protection and reasonableness of relocation)

### Readings

#### Core

J. Hathaway and M. Foster, 'International Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 357–417.

'The Michigan Guidelines on the Internal Protection Alternative', April 1999.

#### Extended

N. Kelley, 'Internal Flight/Relocation/Protection Alternative: Is It Reasonable?' *International Journal of Refugee Law*, vol. 14, no. 1 (2002), p. 4.

H. Storey, 'The Internal Flight Alternative Test: The Jurisprudence Re-examined' *International Journal of Refugee Law*, vol. 10, no. 3 (1998), p. 506.

ELENA, 'Research Paper on the Application of the Concept of Internal Protection Alternative' (London, 1998).

#### Editor's note

*Consider the impossibility in many national contexts for people to move from one area to establish a life in another region without family or other ties, financial resources, or skills.*

*Analysis of internal protection alternatives does not end when there is an absence of persecution in a certain region, but must proceed to assess the realistic likelihood of access to protection.*

## **f. Reception**

### UNHCR Documents

UNHCR, 'Reception Standards for Asylum Seekers in the European Union', July 2000, Part I.

UNHCR, 'Reception of Asylum Seekers, Including Standards of Treatment in the Context of Individual Asylum Systems', September 2001.

### Cases

*R (on the applications of Adam, Tesema, and Limbuela) v Secretary of State for the Home Department* (2004), 2004 EWCA 540, All ER (D) 323, Judgments of 21 May 2004 (UK judicial decision holding failure to provide shelter and assistance to destitute asylum seekers violates Article 3, European Convention on Human Rights)

### Editor's note

For further resources, see Section III.2.b (iii).

## **g. Detention**

### International Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150. Art. 26, 31, 36.

Human Rights Committee, 'General Comment No. 27, Freedom of Movement (Art.12)', 2 November 1999.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Art. 27.

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 189–194.

### UNHCR Documents

UNHCR, 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers', February 1999.

UNHCR, 'Detention of Asylum Seekers and Refugees: The Framework, the Problem and Recommended Practice', June 1999.

UNHCR EXCOM, 'Detention of Refugees and Asylum-Seekers', Conclusion No. 44 (XXXVII) – 1986.

UNHCR EXCOM, 'Conclusion on International Protection', Conclusion No. 85 (XLIX) – 1998.

### Soft Law

'Rules for the Protection of Juveniles Deprived of Their Liberty', UN General Assembly Resolution, A/RES/45/113, 14 December 1990.

Commission on Human Rights United Nations Working Group on Arbitrary Detention Deliberation No. 5, 'Situation regarding immigrants and asylum seekers', 28 December 1999, Annex II.

'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', UN General Assembly Resolution, A/RES/43/173, 9 December 1988.

### Readings

#### Core

J. Hathaway, 'Freedom from arbitrary detention and penalization for illegal entry', *The Rights of Refugees under International Law*. (Cambridge: Cambridge University Press, 2005), pp. 413–439.

#### Extended

Amnesty International, 'Migration-Related Detention: A research guide on human rights standards relevant to the detention of migrants, asylum-seekers and refugees', November 2007.

## ***h. Recognition as a Refugee***

### Main Debates

Accelerated Procedures v. 1951 Geneva Convention and International Standards

### Main Points

Minimum Standards for Refugee Status Determination

Prima Facie Recognition

Burden of Persuasion

Linguistic, Psychological, and Cultural Barriers to Credibility Assessment

Frequent Absence of Documentary or Corroborative Evidence

Impact of Absence of Legal Representation

Impact of Barriers of Communication for:

- Asylum Seekers v. Advocates
- Asylum Seekers and Decision Makers

### Editor's note

*An analysis of the minimum standards for refugee status determination should identify and interpret the sources of law that establish these standards.*

## **i. Procedures**

### Soft Law

UNHCR EXCOM, Conclusion No. 8 'Official Records of the General Assembly, Thirty-Second Session', Supplement No. 12, A/32/12/Add.1, para. 53(6)(e).

### UNHCR Documents

UNHCR 'Asylum Processes (Fair and Efficient Asylum Procedures)', in *Global Consultations on International Protection*, 31 May 2001.

### Cases

*The Minister of Home Affairs v. Watchenuka*, 10 November 2003. (South African Supreme Court of Appeal judicial decision regarding rights of asylum seekers prior to determination of refugee status)

### Readings

#### Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 528–535. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 324–332].

S. Legomsky, 'An Asylum Seeker's Bill of Rights in a Non-Utopian World', *Georgetown Immigration Law Journal*, vol. 14 (2000), p. 619.

## ii. Establishing the Facts

### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, para. 195–205.

### Readings

#### Core

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 53–60. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 34–40].

### (a) *Standards of Proof*

#### UNHCR Documents

UNHCR, 'Note on Burden and Standard of Proof in Refugee Claims', 16 December 1998.

#### Cases

*INS v. Cardoza-Fonseca* 480 US 421 (1987). (US judicial decision stating that one in ten probability of harm can constitute well-founded fear)

### (b) *Credibility*

#### Readings

#### Core

J. Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers', *International Journal of Refugee Law*, vol. 13, no. 3 (July 2001), p. 293.

M. Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations', *Georgetown Law Journal*, vol. 17, no. 3 (2003), p. 367.

A. Macklin, 'Truth or Consequences: Credibility Determinations in the Refugee Context', in *The Realities of Refugee Determination on the Eve of a New*

*Millennium: The Role of the Judiciary, IARLJ Conference* (Ottawa: International Association of Refugee Law Judges, 14–16 October 1998).

Extended

W. Kälin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing', *International Migration Review*, vol. 20, no. 2 (1986), p. 230.

**(c) *Special Issues***

Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 206–219.

UNHCR Documents

UNHCR, 'Guidelines on Protection of Refugee Women', July 1991, paras. 57–62.

UNHCR, 'Gender Sensitive Techniques', 1991.

Readings

Core

Physicians for Human Rights, *Medical Testimony on Victims of Torture: A Physician's Guide to Political Asylum Cases* (Boston: Physicians for Human Rights, 1991).

Extended

J. Herlihy, 'Evidentiary Assessment and Psychology Difficulties', in G. Noll (ed.), *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Leiden: Martinus Nijhoff Publishers, 2005), pp. 123–140.

C. Rousseau, F. Crepeau, P. Foxen, and F. Houle, 'The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board', *Journal of Refugee Studies*, vol. 15, no. 1 (March 2002), p. 43.

## ***i. Rights and Obligations of Refugees***

### Main Debates

Should Refugees Enjoy the Rights of Citizens?

### Main Points

Comparison with Rights of Other Non-Nationals

### Readings

#### Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 524–527. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 307–315].
- J. Hathaway, ‘Attachment to the Asylum State’ and ‘Rights of Refugees Lawfully Staying’, *The Rights of Refugees under International Law* (Cambridge: Cambridge University, 2005), pp. 156–160, 730–912.

#### Editor’s note

*Those with refugee status generally have legal rights as great or greater than many other non-citizens who are lawfully present in the host state.*

## ***j. Cessation of Refugee Status***

### Main Debates

What Should be the Standard of Proof to Show a Change of Circumstances?  
Who Carries the Burden?

### Main Points

Gaining or Re-gaining National Protection  
Changed Circumstances  
Risk of Short-Term Trips to Homeland

### Soft Law

UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’, HCR/IP/4/Rev.1, 1979, paras. 118–139.

UNHCR EXCOM, ‘Cessation of Status’, Conclusion No. 69 (XLIII), 1992.

### UNHCR Documents

UNHCR, 'The Cessation Clauses: Guidelines on their application', 1999.

UNHCR, 'Discussion Note on the Application of the "Ceased Circumstances" Cessation Clauses in the 1951 Convention', 20 December 1991.

UNHCR, 'Note on Cessation Clauses', 30 May 1997.

UNHCR, Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), February 2003.

### Readings

#### Core

J. Fitzpatrick and R. Bonoan, 'Cessation of Refugee Protection', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 491–544.

G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 139–142. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 84–87].

J. Hathaway, 'The Right of States to Repatriate Former Refugees', *Ohio State Journal on Dispute Resolution*, vol. 20 (2005), p. 175.

J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 191–205, 209–211.

UNHCR, 'Summary Conclusions: Cessation of Refugee Status, Expert Round-table, Lisbon', May 2001.

#### Editor's note

*Refugee Status may cease for among the following reasons:*

- 1) acts voluntarily taken by refugees, such as the voluntary return to live at the site where persecution was earlier feared*
- 2) changed circumstances in the home country that eliminate the fear of persecution*
- 3) short-term trips to homelands that may be triggered by family illness or other compelling circumstances, yet may indicate that persecution is no longer feared*



### **3. Other Forms and Instruments of Protection**

#### ***a. Universal Human Rights Instruments***

##### Main Debates

To What Extent Can International Human Rights Law Fill Existing Gaps in Refugee Protection?

Legally Binding Protection Norms v. Discretionary State Practices

How Can International Human Rights Treaties Provide Protection without Enforcement Powers?

##### Main Points

Universal Instruments for Human Rights Protection

Complementarity between 1951 Geneva Convention and Other Human Rights Instruments

International Monitoring Bodies and their Protection-Related Practices

##### Editor's note

*See also Section III.1*

#### **i. Universal Declaration of Human Rights; The UN International Covenant for Civil and Political Rights**

##### Treaties

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, Arts. 7, 9, 12, 13.

##### Soft Law

Human Rights Committee, General Comment No. 20.: Article 7. (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)', October 3, 1992.

Human Rights Committee, 'General Comment No. 21: Article 10. (Humane treatment of persons deprived of their liberty)', 10 April 1992.

Universal Declaration of Human Rights, UN General Assembly Resolution, A/RES/217 A (III), 10 December 1948, ), Arts. 13, 14.

Vienna Declaration, UN World Conference on Human Rights, June 1993, para. 23.

### Human Rights Committee Cases

- C. v. Australia*, HRC, Views of 28 October 2002, no. 900/1999, (lengthy detention causing mental illness of applicant and deportation to Iran constitutes a violation of Articles 7 and 9)
- Torres v. Finland*, HRC, Views of 2 April 1990, no. 291/1988 (failure of state to provide alien in detention for more than five days a right of access to the court proceedings for judicial review of the lawfulness of his detention constitutes a violation of Article 9)
- A. v. Australia*, HRC, Views of 30 April 1997, no. 560/1993. (absence of individual consideration of reasons for detention of asylum seekers constitutes a violation of Article 9)

### Readings

#### Core

- J. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 105–112.
- S. Joseph, J. Schultz, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 1999), pp. 162–170, Section 9.58.
- R. Plender and N. Mole, ‘Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments’, in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 81–105.

#### Extended

- U. Brandl, ‘Soft Law as a Source of International and European Refugee Law’, in J.Y. Carlier and D. Vanheule (eds), *Europe and Refugees – A Challenge?* (The Hague: Kluwer Law International, 1997).
- M. Kjaerum, ‘Article 14’, in G. Alfredson and A. Eide (eds), *The Universal Declaration of Human Rights. A Common Standard of Achievement* (The Hague: Nijhoff, 1999).

### Editor's note

*Although there are only a small number of Human Rights Committee (HRC) opinions concerning asylum seekers, the HRC, in its Concluding Observations on State Party reports frequently addresses the circumstances of asylum seekers and refugees in their assessment of State Party compliance with specific articles under the ICCPR. This offers another channel for asylum rights advocacy.*

## **ii. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

### Treaties

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, Arts. 1, 3, 10, 16.

### Soft Law

UN Committee Against Torture (CAT), 'CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)', 21 November 1997. A/53/44, paras. 6, 7.

### Cases

#### Core

- V.L. v. Switzerland*, CAT 262/2005, 20 November 2006. (late disclosure in asylum proceedings of rape does not impair claimant's credibility)
- Agiza v. Sweden*, CAT 233/2003, 20 May 2005. (non-refoulement under CAT absolute even in context of national security concerns; insufficient diplomatic assurances obtained by sending country)
- Mutombo v. Switzerland*, CAT 13/1993, 27 April 1994. (no violation where applicant has established existence of gross violations of human rights in country of return, absent sufficient evidence of the applicant's 'personal risk')
- Tala v. Sweden*, CAT 43/1996, 15 November 1996. (contradictions and inconsistencies in testimony of asylum seeker attributed to post-traumatic stress disorder resulting from torture)
- Aemei v. Switzerland*, CAT 34/1995, 9 May 1997. (activities carried out by receiving state may also give rise to risk of being subjected to torture)

*Paetz v. Sweden*, CAT 39/1996, 28 April 1997. (membership of applicant in the Peruvian Shining Path organisation is not material to enjoyment of absolute Art. 3. right, contrasting with Art. 1F of 1951 Geneva Convention)

### Extended

For a comparative analysis of national case law see *Matter of J-E-23* Immigration & Naturalization Decisions 291, (BIA 2002). (detention in Haitian prison is not torture when legally sanctioned).

*Matter of G-A*, 23 Immigration & Naturalization Decisions 366 (BIA 2002).

### Readings

#### Core

- J. Doerfel, 'The Convention Against Torture and the Protection of Refugees' *Refugee Survey Quarterly*, vol. 24, no. 2 (2005), pp. 83–97.
- D. Weissbrodt and I. Hortreiter, 'The Principle of Non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties', *Buffalo Human Rights Law Review*, vol. 5, no. 1 (1999).

### Extended

- B. Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees', *International Journal of Refugee Law*, vol. 11, no. 3 (July 1999), pp. 479–495.
- R. Plender and N. Mole, 'Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments', in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge: Cambridge University Press, 1999), pp. 81–105.

### Editor's note

*Recent jurisprudence from CATC reflects a return by the Committee of greater degree of scrutiny of State Party submissions. Since the publication of Doerfel's article in 2005 and May 2007, the CATC has found 9 violations of Article 3.*

### iii. The UN Convention on the Rights of the Child

#### Treaties

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.

#### Soft Law

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', HCR/IP/4/Rev.1, 1979, paras. 213–219.

UNHCR EXCOM, 'Refugee Children', Conclusion No. 47 (XXXVIII), 1987.

UNHCR EXCOM, 'Refugee Children', No. 59 (XL), 1989.

UNHCR EXCOM, 'Refugee Children and Adolescents', No. 84 (XLVIII), 1997.

#### UNHCR Documents

UNHCR, 'Refugee Children: Guidelines on Protection and Care', 1994, Ch. 2, 8, 10.

UNHCR, 'Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum', 1997.

UNHCR, 'Note on Refugee Children', EC/SCP/46, 9 July 1987.

#### Readings

##### Core

Immigration and Refugee Board (Canada), 'Child Refugee Claimants: Procedural and Evidentiary Issues', September 1996.

Save the Children and UNHCR, 'Separated Children in Europe Programme "Statement of Good Practice"', October 2004.

##### Editor's note

See Section III.2.b.i (a). *Council of the European Union Resolution on Unaccompanied Minors Who are Nationals of Third Countries*

### iv. The Geneva Conventions and Protocols: Minimum Standards in Times of War

#### Treaties

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150, Article 9.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.  
Fourth Geneva Convention Relative to the Protection to Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, Arts. 27, 35, 44, 45, 46, 70 (special protection for women)  
Additional Protocol I to the Geneva Conventions, 8 June 1977, 1125 U.N.T.S. 3.  
Additional Protocol II to the Geneva Conventions, 8 June 1977, 1125 U.N.T.S. 609.

### Soft Law

UNHCR EXCOM, 'Conclusion on the civilian and humanitarian character of asylum', Conclusion No. 94 (LIII), 2002.  
UNHCR EXCOM, 'Military Attacks on Refugee Camps and Settlement in Southern Africa and Elsewhere', Conclusion No. 27 (XXXIII), 1982.  
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### UNHCR Documents

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### Readings

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### Editor's note

*Within the context of an overall refugee curriculum for clinical teaching, this topic may be given less emphasis than the universal instruments discussed above.*

## **b. Special Forms of Protection: Subsidiary Protection and Humanitarian Status**

### Main Debates

Adequacy of the 1951 Geneva Convention in the Context of the Various Forms of Forced Displacement: Are Additional (International or Regional) Instruments Needed to Secure Protection for Victims of Generalised Violence, Armed Conflict etc.?

Should there be a 'Sliding Scale' of Protection and Entitlements?

### Main Points

The Need for a Wider Scope of Beneficiaries, and for Establishing the Protection Standards to be Accorded for Persons in Need of Subsidiary Protection.

### UNHCR Documents

UNHCR, 'The International Protection of Refugees: Complementary Forms of Protection', April 2001.

### Readings

#### Core

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- J. Vedsted-Hansen, 'Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the perspective of International Law', in D. Bouteillet-Paquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?* (Brussels: Bruylant, 2002), pp. 57–78.

## **c. Temporary Protection**

### Main Debates

Adequacy of the 1951 Geneva Convention in Mass Flight Situations: Legally Binding Protection Norms v. Discretionary State Practices

### Main Points

Temporary Protection Is Not an Alternative to Convention Protection, but a Precursor to it (or to Subsidiary Protection) – until Individual Procedures Are Carried Out or Group Recognition Occurs

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#### Extended

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- G. Noll and J. Vedsted-Hansen, 'Temporary Protection and Burden Sharing: Conditionalising Access Suspending Refugee Rights?', in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001), pp. 195–222.
- J. van Selm, 'Temporarily Protecting Displaced Persons or Offering the Possibility to Start a New Life in the European Union', *European Journal of Migration and Law*, vol. 3, no. 1 (2001), pp. 23–35.
- J. Vedsted-Hansen, 'Collective Protection – Temporary Asylum on a Changing Basis', in *[Temporary Protection and Repatriation. Bosnian Refugees in the Nordic Countries]*, Copenhagen: Nordic Council of Ministers 1999 (Nord 1999:4), pp. 15–44.

Editor's note

See Sections II.2.b, II.2.i, and II.2.j.

See also Section III.2.b.iv.

## SECTION III

### European Framework for Refugee Protection

#### 1. The Council of Europe and Refugee Protection

##### ***a. Legal and Policy Framework for Refugee Protection***

###### Main Debates

Should the Council of Europe Play a Greater Role in Standard Setting in the Area of Asylum in a Wider Pan-European Context?

###### Main Points

Binding v. Non-Binding Regional Instruments

Committee of Ministers Recommendations v. Parliamentary Assembly Resolutions

Establishing Harmonization between EU and Non-EU States

###### Treaties

###### Regional

###### Core

European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 November 1950, E.T.S. 005.

European Agreement on the Abolition of Visas for Refugees, 20 April 1959, E.T.S. 031.

European Agreement on Transfer of Responsibility for Refugees, 16 October 1980, E.T.S. 107.

European Convention on Extradition, 13 December 1957, E.T.S. 24.

European Social Charter, 18 October 1961, E.T.S. 035.

European Social Charter (Revised), 3 May 1996, E.T.S. 163.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, E.T.S. 126.

### Extended

- European Convention on Consular Functions, 11 December 1967, E.T.S. 61.  
Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, 11 December 1967, E.T.S. 61A.  
European Convention on the Suppression of Terrorism, 27 January 1977, E.T.S. 090.  
Protocol Amending the European Convention on the Suppression of Terrorism, 15 May 2003, E.T.S. 190.  
Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, E.T.S. 196.  
Framework Convention for the Protection of National Minorities, 1 February 1995, E.T.S. 157.  
European Convention on Nationality, 6 November 1997, E.T.S. 166.  
European Convention on Repatriation of Minors, 28 May 1970, E.T.S. 071.  
Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, E.T.S. 197.

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#### Council of Europe: Committee of Ministers

- Committee of Ministers of the Council of Europe, 'Declaration on Territorial Asylum', 18 November 1977.  
Committee of Ministers of the Council of Europe, 'Resolution 14 (1967) on Asylum to Persons in Danger of Persecution' 29 June 1967.  
Committee of Ministers of the Council of Europe, 'Recommendation 70 (2) (1970) on the Acquisition by Refugees of the Nationality of their Country of Residence', 26 January 1970.  
Committee of Ministers of the Council of Europe, 'Recommendation R (81) 16 on the Harmonisation of National Procedures Relating to Asylum', 5 November 1981.  
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- Committee of Ministers of the Council of Europe, 'Recommendation R (97) 22 Containing Guidelines on the Application of the Safe Third Country Concept', 25 November 1997.
- Committee of Ministers of the Council of Europe, 'Recommendation R (98) 13 on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the context of Article 13 of the European Convention on Human Rights', 18 September 1998.
- Committee of Ministers of the Council of Europe, 'Recommendation R (99) 23 on Family Reunion for Refugees and other Persons in need of International Protection', 15 December 1999.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2000) 9 on Temporary Protection', 3 May 2000.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2001) 18 to Member States on Subsidiary Protection', 27 November 2001.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2003) 5 to Member States on Measures of Detention of Asylum Seekers', 16 April 2003.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2004) 9E to Member States on the Concept of "Membership in a Particular Social Group" (MPSG) in the Context of 1951 Convention', 30 June 2004.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2004) 14E to Member States on the Movement and Encampment of Travellers in Europe', 1 December 2004.
- Committee of Ministers of the Council of Europe, 'Recommendation R (2005) 6E to Member States on Exclusion from Refugee Status in the Context of Article 1F of the Convention Related to the Status of Refugees', 23 March 2005.

### Soft Law

#### Council of Europe: Parliamentary Assembly

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- Parliamentary Assembly of the Council of Europe 'Recommendation 1624 (2003) on Common Policy on Migration and Asylum', 30 September 2003.

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- Parliamentary Assembly of the Council of Europe, ‘Recommendation 773 (1976) on De Facto Refugees’, 26 January 1976.
- Parliamentary Assembly of the Council of Europe, ‘Recommendation 1088 (1988) on the Right to Territorial Asylum’, 7 October 1988.
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- Parliamentary Assembly of the Council of Europe, ‘Recommendation 1475 (2000) on Arrival of Asylum-seekers at European Airports’, 26 September 2000.
- Parliamentary Assembly of the Council of Europe, ‘Recommendation 1645 (2004) on Access to Assistance and Protection of Asylum-seekers at European Seaports and Coastal Areas’, 29 January 2004.
- Parliamentary Assembly of the Council of Europe, ‘Recommendation 1374 (1998) on Situation of Refugee Women in Europe’, 26 May 1998.
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Commissioner for Human Rights 'Recommendation CommDH (04) 1 on Combating Trafficking of Children in Europe', 19 January 2004.  
Commissioner for Human Rights 'Preliminary Report CommDH (05) 4 on the Human Rights Situation of the Roma, Sinti and Travellers in Europe', 4 May 2005.

### Readings

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### Editor's note

*The Committee of Ministers is empowered to make recommendations to Members States on matters for which the Committee has agreed a "common policy". Recommendations of the Parliamentary Assembly contain proposals addressed to the Committee of Ministers, the implementation of which is the competence of national governments.*  
*Resolutions of the Parliamentary Assembly embody decisions on policy issues and have no binding effect.*

## ***b. The European Convention on Human Rights and Fundamental Freedoms***

### Main Debates

Refugee Protection under Regional v. Universal Treaties

Has the European Court of Human Rights (ECtHR) Exhibited Too Much or Too Little Deference to National Refugee Decision-Making Processes?

### Main Points

Scope of Protection under Article 3 (Art. 3) of the ECHR v. Articles 1 and 33 of the 1951 Convention

Effective Remedies for Rejected Asylum Seekers under the ECHR

Expulsion

Family Reunification

Detention

### Treaties

#### Regional

##### Core

European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 4 November 1950 (213 U.N.T.S. 222)

### Cases

#### Core

Art. 3 – prohibition of torture, inhuman or degrading treatment or punishment

*Soering v. UK*, ECtHR Judgment of 7 July 1989 (holding extradition from UK to USA of German national charged with capital crime and at risk of serving on death row would be a violation of Art. 3, recognising the extra-territorial effect of the ECHR provisions)

*Chahal v. UK*, ECtHR judgment of 15 November 1996 (holding that deportation of a Sikh separatist to India on national security grounds would be in breach of ECHR Art. 3, as he would face real risk of being subjected to treatment contrary to Art. 3; the prohibition in Art. 3 is absolute also in expulsion cases, and the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration)

- Ahmed v. Austria*, ECtHR judgment of 17 December 1996 (reconfirming the absolute nature of Art. 3; deportation of a Somali convicted of serious criminal offences would therefore be a violation of Art. 3, as the applicant was under the risk to be subjected to inhuman and degrading treatment by non-state agents upon expulsion)
- Hilal v. UK*, ECtHR judgment of 6 March 2001 (expulsion of Tanzanian opposition party member, having previously suffered serious ill-treatment in detention, would be contrary to Art. 3; no 'internal flight alternative' found to be viable in his case)
- Jabari v. Turkey*, ECtHR judgment of 11 July 2000 (holding violation of Art. 3 in case of deportation that would return a woman who has committed adultery to Iran; Art. 13 violated as well due to the lack of an effective remedy with suspensive effect to challenge the rejection of her asylum claim)
- Cruz Varas and others v. Sweden*, ECtHR judgment of 20 March 1991 (recognizing the extra-territorial effect of Art. 3 similarly applicable to rejected asylum seekers; finding no Art. 3 violation in expulsion of Chilean national denied asylum, noting that risk assessment by State Party must be based on facts known at time of expulsion)
- Vilvarajah and others v. UK*, ECtHR judgment of 30 October 1991 (finding no breach of Art. 3 although applicants claimed to have been subjected to ill-treatment upon return to Sri Lanka; this had not been a foreseeable consequence of the removal of the applicants, in the light of the general situation in Sri Lanka and their personal circumstances; a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Art. 3, and there existed no special distinguishing features that could or ought to have enabled the UK authorities to foresee that they would be treated in this way)
- H.L.R. v. France*, ECtHR judgment of 29 April 1997 (finding no violation of Art. 3 in case of expulsion of the applicant to Columbia, as there was no relevant evidence of risk of ill-treatment by non-state agents; thereby recognising that ill-treatment caused by such actors would fall within the scope of Art. 3 if the authorities are not able to obviate the risk by providing adequate protection)
- D. v. UK*, ECtHR judgment of 2 May 1997 (applicant suffering from advanced stages of a terminal HIV/AIDS illness; expulsion to the country of origin, known for its lack of medical facilities and appropriate treatment in case, and



where he would have no family or friends to care for him, would amount to inhumane treatment prohibited by Art. 3; the Court stressed the very exceptional circumstances of the case and the compelling humanitarian considerations at stake)

*S.C.C. v. Sweden*, ECtHR admissibility decision of 15 February 2000 (expulsion to the country of origin, known for the availability of HIV/AIDS treatment, in case of relatively well-off applicant in early stage of illness, with close relatives residing in her homeland, does not give rise to compelling humanitarian considerations)

*Bensaid v. UK*, ECtHR judgment of 6 February 2001 (high threshold set by Art. 3, according to which a schizophrenic suffering from psychotic illness does not face a sufficiently real risk after his return to Algeria; not compelling humanitarian considerations as required under Art. 3, once the necessary treatment is available in the country of destination)

*Venkatajalasarma v. Netherlands*, ECtHR judgment of 17 February 2004 (current situation in Sri Lanka makes it unlikely that Tamil applicant would run a real risk of being subject to ill-treatment after his expulsion from the Netherlands)

*Mamatkulov and Askarov v. Turkey*, ECtHR judgment of 4 February 2005 (evidence insufficient to find a violation of Art. 3 by the applicants' extradition from Turkey to Uzbekistan; the extradition constituted Turkey's non-adherence to the Court's indication of interim measures under Rule 39 of the ECHR Rules of Procedure, thereby violating ECHR, Art. 34)

*Said v. Netherlands*, ECtHR judgment of 5 July 2005 (asylum seeker held to be protected against refoulement under Art. 3; the Dutch authorities had taken the failure to submit documents establishing his identity, nationality, or travel itinerary as affecting the credibility of his statements; the Court instead found the applicant's statements consistent, corroborated by information from Amnesty International, and thus held that substantial grounds had been shown for believing that, if expelled, he would be exposed to a real risk of ill-treatment as prohibited by Art. 3)

*N. v. Finland*, ECtHR judgment of 26 July 2005 (asylum seeker held to be protected against refoulement under Art. 3, despite the Finnish authorities' doubts about his identity, origin, and credibility; two delegates of the Court

were sent to take oral evidence from the applicant, his wife and a Finnish senior official; while retaining doubts about the credibility on some points, the Court found that the applicant's accounts on the whole had to be considered sufficiently consistent and credible; deportation would therefore be in breach of Art. 3)

*Bader v. Sweden*, ECtHR judgment of 8 November 2005 (asylum seeker held to be protected against refoulement due to a risk of flagrant denial of fair trial that might result in the death penalty; such treatment would amount to arbitrary deprivation of life in breach of Art. 2; deportation of both the asylum seeker and his family members would therefore give rise to violations of Articles 2 and 3)

*Aoulmi v. France*, ECtHR judgment of 17 January 2006 (high threshold set by Art. 3, in particular if deporting state has no direct responsibility for the potential infliction of harm due to substandard health services in country of origin; not proven that the applicant could not receive adequate medical treatment upon expulsion to Algeria; the binding nature of Rule 39 indications was reconfirmed, hence deportation despite such indication was held to violate Art. 34)

*D. and others v. Turkey*, ECtHR judgment of 22 June 2006 (deportation of woman applicant in view of the awaiting execution of severe corporal punishment in Iran would constitute violation of Art. 3, as such punishment would inflict harm to her personal dignity and her physical and mental integrity; violation of Art. 3 would also occur to her husband and daughter, given their fear resulting from the prospective ill-treatment of D)

*Mayeka and Mitunga v. Belgium*, ECtHR judgment of 12 October 2006 (the arrest, detention and subsequent deportation of a 5 year old child, transiting Belgium in order to join her mother living as a refugee in Canada, held to be in violation of Articles 3, 5, and 8; breaches of Art. 3 were found both due to the conditions of the child's detention, the conduct of the deportation of the child to DR Congo, and the resulting distress and anxiety suffered by her mother)

*Salah Sheekh v. Netherlands*, ECtHR judgment of 11 January 2007 (asylum seeker held to be protected against refoulement under Art. 3; there was a real chance that deportation to 'relatively safe' areas in Somalia would result in his

removal to unsafe areas, hence there was no ‘internal flight alternative’ viable; the Court emphasised that even if ill-treatment be meted out arbitrarily or seen as a consequence of the general unstable situation, the asylum seeker would be protected under Art. 3, holding that it cannot be required that an applicant establishes further special distinguishing features concerning him personally in order to show that he would be personally at risk)

### Extended

#### Article 3 – prohibition of torture, inhuman or degrading treatment or punishment

*Gomes v. Sweden*, ECtHR admissibility decision of 7 February 2006 (application declared inadmissible; the complaints of risk of death penalty, life imprisonment and torture held to be manifestly ill-founded due to the contradictory information given by the applicant to the Swedish authorities, and the lack of documents substantiating his allegations)

*Ayegh v. Sweden*, ECtHR admissibility decision of 7 November 2006 (application declared inadmissible; the authenticity of documents invoked by the applicant was in dispute, and she was found not to have established a real risk to her life or physical integrity if deported to Iran; if the benefit of the doubt is to be given to asylum seekers, they must provide satisfactory explanation when the veracity of their submissions is questioned)

#### Article 1 – territorial scope of applicability

*Al-Adsani v. UK*, ECtHR judgment of 21 November 2001 (state not responsible for torture that has taken place outside the Council of Europe member state jurisdiction, even in case of an applicant of dual British/Kuwaiti citizenship; any positive obligation deriving from ECHR Articles 1 and 3 could extend only to the prevention of torture)

#### Article 5 – deprivation of liberty

*Saadi v. UK*, ECtHR judgment of 11 July 2006 (detention of an asylum seeker to facilitate the examination found to be justified under Article 5 (1) (f); informing the applicant’s lawyer of the reason for the detention of his client after 76 hours of detention was incompatible with the requirement under Article 5 (2) to provide such information promptly)

### Article 9 – right to freedom of religion

*Z. and T. v. UK*, ECtHR admissibility decision of 28 February 2006 (application declared inadmissible; the Court not ruling out the possibility that, in exceptional circumstances, there might be protection against refoulement on the basis of Art. 9 where the person would run a real risk of flagrant violation of that provision in the receiving state)

### Article 13 – right to effective remedy

*Conka v. Belgium*, ECtHR judgment of 5 February 2002 (the detention of rejected Roma asylum seekers before deportation to Slovakia constituted a violation of Art. 5; due to the specific circumstances of the deportation the prohibition against collective expulsion under Protocol 4 Art. 4 was violated; the procedure followed by the Belgian authorities did not provide an effective remedy in accordance with Art. 13, requiring guarantees of suspensive effect)

*Gebremedhin v. France*, ECtHR judgment of 26 April 2007 (holding that the particular border procedure declaring ‘manifestly unfounded’ asylum applications inadmissible, and refusing the asylum seeker entry into the territory, was incompatible with Art. 13 taken together with Art. 3; emphasising that in order to be effective, the domestic remedy must have suspensive effect as of right)

### Readings

#### Core

- H. Lambert, ‘Article 3 of the European Convention on Human Rights and the Protection of Refugees and Rejected Asylum-Seekers against *Refoulement* from Europe’, in *European Convention on Human Rights and Protection of Persons in need of International Protection* (Chisinau, 2000), pp. 77–87.
- UNHCR, ‘UNHCR Manual on Refugee Protection and the European Convention on Human Rights’, April 2003.

#### Extended

- J. Fitzpatrick, *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, (New York: Ardsley Transnational Publishers Inc., 2002), pp. 359–427.

D.J. Harris, M. O'Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 2001).

C. Ovey and R. White, *Jacobs and White, The European Convention on Human Rights* (Oxford: Clarendon Press, 2006), pp. 88–90, 99–106.

#### Editor's note

*The use of case studies is an effective method for teaching the scope of protection offered by the ECHR, see Part III of the 'UNHCR Manual on Refugee Protection and the European Convention on Human Rights', 2003.*

*Compare the beneficiaries under the ECHR in contrast to the 1951 Geneva Convention.*

*The ECHR can be invoked by a much wider range of individuals, including refused asylum-seekers, beneficiaries of Temporary Protected Status and non-Convention refugees.*

*To compare the absolute protection offered under Article 3 of the ECHR with Articles 1 (f) and 33 of the 1951 Geneva Convention, see Section II.2.b.iii.*

*The practice of the European Court of Human Rights has led to an extended protection expanding the ambit of the non-refoulement principle – see also Section II 1.c.*

## **2. The European Union**

### **a. The Evolving EU Acquis on Asylum**

#### **i. European Integration and Asylum**

##### Main Debates

Is the EU Involvement in Asylum Law Raising or Lowering Standards in Practice?  
Which of these Approaches Should the EU Take?

What Is the Relationship of the 1951 Geneva Convention with EU Asylum Law?

What Is the Relationship between the 1951 Geneva Convention and Member States' National Law Enacted Pursuant to the European Community Instruments?

What Are the Possible Implications of the EU's Decision to Work towards Full Establishment of a Common European Asylum System by 2010?

### Main Points

Historical Development of EU Law on Asylum

Objectives of Giving EU Competence over Asylum Matters

### EU Documents

Commission paper: Green Paper on the Future Common European Asylum, COM (2007) 301 final. 6 June 2007.

Council of the European Union, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', OJ C 53, 3 March 2005.

'Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations', COM (2004) 401, 2 June 2004.

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Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union OJ C198 (12 August 2005).

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'The European Union, Asylum and the International Refugee Protection Regime: the New Multiannual Programme in the Area of Freedom, Security and Justice', Summary of UNHCR's Recommendations to the Multiannual Programme, September 2004.

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E. Guild, 'The Europeanisation of Europe's Asylum policy', *International Journal of Refugee Law*, vol. 18, nos. 3-4 (September/December 2006), pp. 630-651.

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Immigration Law Practitioners Association, The Standing Committee of Experts on International Immigration, Refugee and Criminal Law, 'An Area of Freedom, Security and Justice Five Years On Immigration and Asylum for the Next Five Years', Joint Submissions to the European Commission, June 2005.

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UNHCR, 'Towards a Common European Asylum Policy', in C. D. Urbano de Sousa and P. De Bruycker, *The Emergence of a European Asylum Policy* (Brussels: Bruylant, 2004), pp. 227–295.

## **ii. The Institutional and Legal Framework for European Refugee Protection**

### Main Debates

What are the Objectives of EU Involvement in Asylum Law?

Does It Aim at Human Rights Protection, Application of Asylum in the Context of EU Internal Market, or Establishment of Fortress Europe?

### Main Points

Human Rights and the EU

Institutional Actors and their Powers and Roles

Evolving Roles of the Different EU Institutions in EU Asylum Law- and Policy-making

### EU Instruments

- Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection, COM (2007) 298, 6 June 2007.
- Draft Treaty amending the Treaty on the European Union and the Treaty establishing the European Community, CIG 1/07 and CIG 1/07 COR 1, 23 July 2007.
- Treaty Establishing the European Community (1957), OJ C 325/33, 24 December 2002, Title IV, Arts. 61–68.
- Protocol on Asylum for Nationals and Member States of the EU, OJ C 340/103, 10 November 1997.
- Acquis of the European Union under Title IV of the TEC and title VI of the TEU. Consolidated version 2007.
- Charter of Fundamental Rights of the EU, OJ C 364/1, 18 December 2000, Arts. 18, 19.
- Draft Treaty Establishing a Constitution for Europe, (2004), OJ 2004 C 310, 25 June 2004, Title I, Arts. 1–9.
- Draft Treaty Establishing a Constitution for Europe, (2004), OJ 2004 C 310, 25 June 2004, Title III, Arts. III-266–III-268.

### Readings

#### Core

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- I. Boccardi, 'After Amsterdam: Towards an EU Asylum Policy?', in I. Boccardi, *Europe and Refugees – Towards an EU Asylum Policy* (The Hague: Kluwer Law International, 2002), Chapter 6.
- S. Peers, 'The Institutional Framework for EC Immigration and Asylum Law', in Peers and Rogers, *EU Immigration and Asylum Law*, (Leiden/Boston: Martinus Nijhoff Publishers, 2006), pp. 19–47.

#### Editor's note

*Note the limits on the Court's jurisdiction, voting rules in Council and EP, and the shared Commission initiative. The Commission has full right of initiative from*



*1 May 2004. The Reform Treaty, if ratified as proposed, will give the European Court of Justice wider jurisdiction in asylum cases.*

*Consider the provision on changed rules for decision-making on asylum, Article 67(5), in force with the Treaty of Nice as of 1 February 2003:*

- *What do 'common rules and basic principles' mean, especially since EC power is mostly limited to minimum standards?*
- *The Council has now resolved to move to co-decision in all areas covered by Chapter IV of the Amsterdam Treaty, with the exception of legal migration. this means that while the Parliament will have the power to bind the Council to follow its recommendations in many areas, thus Member States will retain sole decision-making rights in respect of the sensitive question of criteria, rules and programmes for legal (notably economic) migration to their territory, which is currently under discussion at a policy level among EU States.*
- *The Commission is responsible, in its role as 'guardian of the Treaties', for monitoring transposition and implementation at national level of the asylum Directives adopted in the first phase of harmonisation. What powers and tools has it at its disposal to compel States to adopt and implement national laws in line with the Community standards?*
- *A major outstanding question will be the possible consequences of State laws and practices which could be in line with the minimum standards of the Directives, but are potentially contrary to the 1951 Geneva Convention and other international legal instruments. The question of what bodies would have power and standing to challenge such national measures remains sensitive and widely debated.*

## **b. European Refugee Protection: Practices and Policies**

### **i. Access to Territory**

#### Main Debates

Displacement Activities v. Duty to Provide Protection

Non-Entrée Policies vs. Duty to Provide Protection

### Main Points

Tension between Objectives of Migration Control, Particularly Control of Irregular Migration, and Protection Obligations

### EU Instruments

Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13 April 2006.

### Readings

#### Core

- G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, vol. 5, no. 3 (2003), pp. 303–341.
- J. van der Klaauw, 'Irregular Migration and Asylum-Seeking: Forced Marriage or Reason for Divorce?', in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), pp. 115–136, II.6.
- T. Spijkerboer, 'Briefing Paper: Trends in the different legislations of the Member States concerning asylum in the EU: the human costs of border control', IPOL/C/LIBE/FWC/2005-23-SC1 PE 378.258 (2006).

### Extended

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### Editor's note

*Examine how attempts to reconcile migration control and protection have been made when EC legislation was proposed and applied in practice when the legislation was adopted.*

## *(a) International and Regional Legal Framework*

### Main Debates

Do the 1951 Geneva Convention and Article 3 of the ECHR Create a Right of Access to Territory?

### Main Points

Absence of a Right to Cross a Border as Such under International Law

### EU Instruments

Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 105, 13 April 2006.

Proposal for a Regulation of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism, COM (2006) 401, 19 July 2007.

Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of third Countries OJ C 221, 19 July 1997.

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L 349/1, 25 November 2004.

### Readings

#### Core

- E. Guild, 'Jurisprudence of the ECHR: Lessons for the EU Asylum Policy', in C. Dias Urbano de Sousa and P. de Bruycker, *The Emergence of a European Asylum Policy*, (Brussels: Bruylant, 2004), pp. 329–342.
- E. Guild, 'Reaching into the European State: Border Pressures and International Asylum Obligations', in E. Guild, *Moving the Borders of Europe* (University of Nijmegen, 2001), pp. 52–61.

### Extended

- E. Brouwer, 'Data Surveillance and Border Control in the EU: Balancing Efficiency and Legal Protection', in T. Balzacq and S. Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future* (Aldershot: Ashgate, 2006), pp. 137–154.
- R. Cholewinski, 'No Right of Entry: The Legal Regime on Crossing the EU Border', in K. Groenendijk, E. Guild, and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer, 2003).
- A. Edwards, 'Human Rights, Refugees, and the Right 'To Enjoy' Asylum', *International Journal of Refugee Law*, vol. 17, no. 2 (2005), pp. 293–330.
- H. Staples, 'Adjudicating Schengen', in K. Groenendijk, E. Guild, and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer, 2003).

### Editor's note

See also the *Gebremedhin v. France* case in section I and the *Prague Airport* case in I(b).

## **(b) Visas**

### Main Debates

Immigration Control v. Human Rights Protection

### Main Points

Content of EU Visa Rules, Particularly Visa List and Visa Format  
Connections between Visa Rules and Asylum Issues

### EU Instruments

- Council Regulation (EC) No 1932/2006 of 21 December 2006 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 405, 30 December 2006.
- Council Regulation (EC) 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa OJ L150, 6 June 2001.
- Council Regulation (EC) 334/2002 of 18 February 2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas, OJ L53, 23 February 2002.

Council Regulation (EC) No 1683/95 laying down a uniform format for visas, amended by Regulation (EC) 334/2002 of 18 February 2002 – consolidated version.

Council Regulation (EC) No 693/2003 establishing a specific Facilitated Transit Document (FTD), a Facilitated Rail Transit Document (FRTD) and amending the Common Consular Instructions and the Common Manual, OJ L 99, 17 April 2003.

Council Decision (EC) No 512/2004 establishing the Visa Information System (VIS), OJ L 213, 15 June 2004.

Council Regulation (EC) No 851/2005 of 2 June 2005 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement as regards the reciprocity mechanism, OJ L 141, 4 June 2005.

### Readings

#### Extended

E. Guild, 'The Border Abroad: Visas and Border Controls', in K. Groenendijk, E. Guild and P. Minderhoud *In Search of Europe's Borders* (The Hague: Kluwer, 2003).

A. Meloni, 'Legal and political significance of passports and visas', in A. Meloni, *Visa Policy within the European Union Structure* (Berlin/New York: Springer, 2006), pp. 24–41.

#### Editor's note

*Note the imposition of visas on every country producing large numbers of refugees/asylum-seekers and the inevitable impact on the likelihood that they will enter illegally and/or use facilitators for smuggling them in.*

*Readers should recall Article 31 of the 1951 Geneva Convention.*

## **(c) Carrier Sanctions**

### Main Debates

Are Carrier Sanctions Permitted Under the Letter of the 1951 Geneva Convention?  
Should Non-State Parties be Responsible for Pre-Screening Asylum Seekers?

### Main Points

Carrier Sanctions as a Deflection Mechanism

### EU Instruments

Council Directive (EC) 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement, OJ L187, 10 July 2001.

Council Directive (EC) 2004/82 on the obligation of carriers to communicate passenger data OJ L261, 6 August 2004.

Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air, OJ L 321, 6 December 2003.

### Readings

#### Core

V. Guiraudon, 'Before the EU Border: Remote Control of the „Huddled Masses”', in K. Groenendijk, E. Guild and P. Minderhoud, *In Search of Europe's Borders* (The Hague: Kluwer Law International, 2003), pp. 191–214.

#### Extended

A. Cruz, *Shifting Responsibility: Carriers' Liability in the Member States of the European Union and North America* (Stoke-on-Trent: Trentham Books Limited, 1995).

## ***(d) Interception and Recue at Sea***

### Main Debates

Who has Responsibility for Asylum-Seekers Intercepted or Rescued on the Seas?  
How does the Position Change if they are Intercepted or Rescued by Member States' Registered Vessels in

- (i) Member States' Territorial Waters?
- (ii) International Waters?
- (iii) The Waters of Third States?

### Main Points

Interaction between International Law of the Sea and Rules of Refugee, Human Rights and Humanitarian Law

### EU Documents

Commission Staff working Document, Study on the international law instruments in relation to illegal immigration by sea, SEC (2007) 691, 15 May 2007

### Soft Law

UNHCR EXCOM 'Protection Safeguards in Interception Measures', Conclusion No 97 (LIV), 2003.

### UNHCR Documents

UNHCR, 'Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea', 1 March 2002.

### Readings

#### Core

R. Barnes, 'Refugee Law at Sea', *International and Comparative Law Quarterly*, vol. 53, no. 1 (January 2004), pp. 47–77.

M. Pugh, 'Drowning not Waving: Boat People and Humanitarianism at Sea', *Journal of Refugee Studies*, vol. 17, no. 1 (March 2004), pp. 50–69.

#### Cases

R (on the application of European Roma Rights Center et al) v Immigration Officer at Prague Airport & Anor (*UNHCR intervening*), [2004] UKHL 55; [2005] 2 AC 1.

## **(e) Extraterritorial Immigration Control**

### Main Debates

What are the Potential Arguments for and against the Legality of Forced Processing Outside the Territory of the EU?

What Practical Problems Could Result from Such a Policy?

What are the Potential Implications of Making Financial Assistance to Non-EU States Conditional upon more Restrictive Border Control?

### Main Points

External Relations Policy as Tool for Non-EU States to Carry out EU Policies

Future Prospect of External Processing of Asylum Applications

### EU Documents

- 'Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Migration and Development: some concrete orientations' COM (2005) 390, 1 September 2005.
- 'Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin "Improving access to durable solutions"', COM (2004) 410, 4 June 2004.
- 'Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes', COM (2005) 388, 1 September 2005.

### UNHCR Documents

- UNHCR, 'Observations on the Communication on Regional Protection Programmes', 10 October 2005.

### Readings

#### Core

- M. Garlick, 'The EU Discussions on Extraterritorial Processing: Solution or Conundrum?', *International Journal of Refugee Law*, vol. 18, nos. 3–4 (September/December 2006), pp. 601
- M. T. Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home affairs External Dimension. The Safe Third Country Concept Revisited', *International Journal of Refugee Law*, vol. 18, nos. 3–4 (September/December 2006), pp. 571.
- O. Lynskey, 'Complementing and completing the Common European Asylum System: a legal analysis of the emerging extraterritorial elements of EY refugee protection policy', *European Law Review*, vol. 31, no. 2 (2006), pp. 230–250.
- G. Noll, 'European Integration and Extraterritorial Protection', in G. Noll, *Negotiating Asylum*, (The Hague: Kluwer Law International, 2000), pp. 117–161.

#### Extended

- S. Kneebone, C. McDowell, and G. Morrell, 'A Mediterranean Solution? Chances of Success', *International Journal of Refugee Law*, vol. 18, nos. 3–4 (September/December 2006), pp. 492–508.



*Editor's note:*

See also the Safe Third Country Section b.ii (a) ii.

## ii. Refugee Status Determination Procedures

### (a) Access to Procedures

#### Main Debates

What Do the Extensive Exceptions and Qualifications to Protection Criteria and Procedural Safeguards in EU Instruments Mean for Access to a Fair and Effective Refugee Status Determination Process?

#### Readings

##### Core

- H. Battjes, 'Asylum procedures', in H. Battjes, *European Asylum Law and International Law*, (Leiden/Boston: Martinus Nijhoff publishers: 2006), pp. 289–384.  
E. Guild, 'Unreadable Papers?', in J. Lodge (ed.), *Are you who you say you are? The EU and Biometric Borders*, (Wolf Legal Publishers, 2007), pp. 31–45.

##### Extended

- G. Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones', *European Journal of Migration and Law*, vol. 5, no. 3 (2003), pp. 303–341.

### i. Responsibility: The Dublin System

#### Main Debates

Distribution Mechanisms v. Protection Obligations

Who Controls the Identity of the Asylum Seeker?

Does the Dublin System Provide Sufficient Safeguards Against Refoulement?

Are there Risks that Asylum Seekers Will Not Receive any Substantive Claim Examination in the EU as a result of the Dublin System?

#### Main Points

Allocating Responsibility for Determining Asylum Claims

Implementing Dublin without Prior Harmonization in Asylum Policies

ID and Data Protection

### EU Documents

Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system SEC (2007) 742, COM/2007/0299.

Commission of the European Communities, Commission Staff Working Paper 'Revisiting the Dublin Convention: developing Community legislation for determining which Member State is responsible for considering an application for asylum submitted in one of the Member States', SEC (2000) 522.

Commission of the European Communities, Commission Staff Working Paper 'First annual report to the Council and the European Parliament on the activities of the EURODAC', SEC (2004) 557.

### EU Instruments

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II), OJ L 050, 25 February 2003.

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 222, 5 September 2003.

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (signed Dublin 15 June 1990, entered into force 1 September 1997) OJ C254, 19 August 1997.

Decision No 1/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention OJ L281, 14 October 1997.

Decision No 2/97 of 9 September 1997 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, establishing the Committee's Rules of Procedure OJ L281, 14 October 1997.

Decision No 1/98 of 30 June 1998 of the Committee set up by Article 18 of the Dublin Convention of 15 June 1990, concerning provisions for the implementation of the Convention OJ L196, 14 July 1998.

- Decision No 1/2000 of 31 October 2000 of the Committee set up by Article 18 of the Dublin Convention concerning the transfer of responsibility for family members in accordance with Article 3(4) and Article 9 of that Convention OJ L281, 7 November 2000.
- Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L316, 15 December 2000.
- Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention OJ L62, 5 March 2002.
- Commission Communication Regarding the Implementation of Council Regulation (EC) No 2725/2000, 'Eurodac', OJ C5, 10 January 2003.
- Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, OJ L 93, 3 April 2001.
- Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, amended by Regulation (EC) 453/2003 of 6 March 2003 – consolidated version, OJ L 81, 21 March, 2001.
- Council Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted, OJ L 304, 30 September 2004.

### Cases

*UK House of Lords Regina v. Secretary of State for the Home department ex parte Adan; Regina v. Secretary of State for the Home Department ex parte Aitseguer*, Judgments of 19 December 2000, [2001] 2 WLR 143. (holding that Somali and Algerian asylum applicants could not be returned to France and Germany on safe third country grounds as both states do not grant protection to those in fear of non- state agent persecution)

*TI v. UK*, ECtHR admissibility decision of 7 March 2000 (noting that agreements for allocating responsibility for asylum seekers do not relieve a State Party to the ECHR of the responsibility to ensure that indirect removal of an asylum seeker will not give rise to Article 3 violation)

### Readings

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G. Noll, 'Formalism vs Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law', *Nordic Journal of International Law*, vol. 70, nos. 1–2 (2001), pp. 161–182.

ECRE, 'Summary report on the Application of the Dublin II Regulation in Europe', March 2006.

*Justice, Asylum: Changing policy and practice in the UK, EU and selected countries* (Justice, 2002), pp. 84–92.

#### Extended

H. Battjes, 'A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Convention', *European Journal of Migration and Law*, vol. 4, no. 2 (2002), pp. 159–192.

M. Bell, 'Mainstreaming equality norms into European Union asylum law', *European Law Review*, vol. 20, no. 1 (2001), pp. 20–34.

U. Brandl, 'Judicial Consideration of the Dublin Convention', in P. de Bruycker and C. de Sousa (eds), *Immigration and Asylum in the European Union* (Brussels: Bruylant, 2003).

E. Brouwer, 'Eurodac: Its Temptations and Limitations', *European Journal of Migration and Law*, vol. 4, no. 2 (2002), 4, pp. 231–247.

#### Editor's note

*An analysis of the Dublin rules should consider the following:*

- *Are they compatible with the 1951 Geneva Convention and the ECHR?*
- *What are the disputes over how to interpret the Dublin rules?*
- *What disputes might arise as to how to interpret the Dublin II rules?*
- *Is Dublin II an effective burden-sharing arrangement, or a burden-shifting mechanism?*

## ii. Safe Third Country

### Main Debates

Deflection and Deterrence Policies v. Protection Obligations

What Minimum Safeguards Should There be for the Implementation of Safe Third Country Returns?

Are European Safe Third Country Practices Shifting the Responsibility for Refugees to Transit States?

Should All EU Member States be Considered as fulfilling requirements for Safe Third Countries?

### Main Points

Contrasts between UNHCR and EU Criteria for Determining Safe Third Countries

Safe Third Country Lists

European Safe Third Country Notion

Chain Deportations

### Soft Law

UNHCR EXCOM, 'Refugees Without An Asylum Country', Conclusion No 15 (XXX), 1979.

UNHCR EXCOM, 'Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection', Conclusion No 58 (XL), 1989.

### EU Instruments

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326, 13 December 2005, Arts. 23(4), 26, 27, 37.

Resolution on a Harmonised Approach to Questions Concerning Host Third Countries Document, Conclusions of the Meeting of the Ministers responsible for Immigration, Doc. 10579/92 IMMIG (London 30 Nov.–1 December 1992).

### UNHCR Documents

UNHCR, 'Background paper no. 1: Legal and practical aspects of the return of persons not in need of protection', May 2001.

UNHCR, 'Background paper no. 2: The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees', May 2001.

UNHCR, 'Background paper no. 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim', May 2001.

### Cases

*UK House of Lords, Regina v. Secretary of State for the Home department ex parte Adan; Regina v Secretary of State for the Home Department ex parte Aitseguer*, Judgments of 19 December 2000, (2001) 2 WLR 143. (holding that Somali and Algerian asylum applicants could not be returned to France and Germany on safe third country grounds as both states do not grant protection to those in fear of non-state agent persecution)

*TI v. UK*, ECtHR admissibility decision of 7 March 2000 (noting that agreements for allocating responsibility for asylum seekers do not relieve a State Party to the ECHR of the responsibility to ensure that indirect removal of an asylum seeker will not give rise to Article 3 violation)

*Al-Rahal v. Minister for Immigration and Multicultural Affairs*, 20 August 2001, (2001) 184 ALR 698 (deportation of Iraqi to Syria as safe third country without actual permission or formal right of entry held not to be a violation of Article 33)

*German Constitutional Court: Judgment in the cases 2 BvR 1938/93 and 2 BvR 2315/93*, 14 May 1996, BVerfGE 94, 49. (upholding the constitutionality of the new clause in the Basic Law introducing the safe third country concept)

### Readings

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G. Goodwin-Gill, 'Safe Country? Says Who?', *International Journal of Refugee Law*, vol. 4, no. 2 (April 1992), pp. 248–250.

S. Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' *International Journal of Refugee Law*, vol 15, no. 4 (October 2003), pp. 567–667.

ECRE, 'Broken Promises-Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection', June, ECRE2004, pp. 10–12.

UNHCR, 'Global Consultations on International Protection, Regional Meeting', 6–7 June 2001, Conclusions'.

'Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics', in R. Byrne, G. Noll, and J. Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Netherlands: Kluwer, 2002), pp. 5–28.

### Extended

R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, vol. 9 (Spring 1996), pp. 190–196.

K. Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective', *International Journal of Refugee Law*, vol. 5, no. 1 (1993), pp. 31–65.

S. Lavenex, "Passing the Buck": European Union Refugee Policies towards Central and Eastern Europe', *Journal of Refugee Studies*, vol. 11, no. 2 (June 1998), pp. 126–145.

### Editor's note

*The documents in this section of the Reader allow the student to see the evolution of safe third country practices in Europe. Note should be taken of the return to the concept of the first country of asylum that is embodied in Art. 26 of the Amended Proposal for the Directive on Minimum Standards. Attention should also be paid to the exceptional border procedure that formalizes the notion of Super Safe Third Countries.*

*See Section v. (b) regarding readmission agreements.*

## *(b) Harmonizing the Definition and the Determination Procedures*

### **i. Harmonization of the 1951 Geneva Convention Refugee Definition**

#### Main Debates

Is the EC legislation on Qualification consistent with the 1951 Geneva Convention?

How Should the 1951 Geneva Convention Exclusion Clauses be Applied in the context of the 'fight against terror'?

#### Main Points

Different Interpretations of the Refugee Definition among Member States

Persecution by Non-State Agents

Protection by Non-state Agents

Gender and Sexual Orientation

Refugee Sur Place

Internal Flight Alternative

Compatibility of Rules on Exclusion, Revocation, Cessation with 1951 Geneva Convention

Differentiation in Rights Accorded to 1951 Geneva Convention Refugees and Subsidiary

Protection Beneficiaries

#### EU Instruments

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted, OJ L 304, 30 September 2004.

Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the 1951 Geneva Convention, 28 July 1951, relating to the status of refugees, OJ L63, 13 March 1996.



### UNHCR Documents

UNHCR 'UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted', January 2005.

### Cases

*Regina v Secretary of State for the Home Department ex parte Adan; Regina v Secretary of State for The Home Department ex parte Aitseguer*, Judgments of 19 December 2000, [2001] 2 WLR 143 (UK judicial decision upholding asylum for applicants fearing persecution by non-state actors)

*Chahal v. UK*, ECtHR judgment of 15 November 1996, (violation of Article 3, Article 5, para 4, and Article 13 in conjunction with Article 3 in case of a deportation order to India of a Sikh separatist on national security grounds needs. The Indian citizen has spent 6 years waiting the deportation. The necessity of judicial review has been proved)

*Secretary of State for the Home Department v. K. Fornah v. Secretary of State for the Home Department*, [2006] UKHL 46 (UK House of Lords holding that women in societies which practised female genital mutilation were 'members of a particular social group' for the purposes of the Refugee Convention)

### Readings

Rt Hon Lord Justice J. Dyson, 'The interpretation of the Refugee Convention: Idiosyncrasy v Uniformity', in *The Asylum Process and the Rule of Law, IARLJ World Conference publication, Stockholm, April 2005* (New Delhi: Manak Publications, 2006).

G. Goodwin-Gill, 'The Individual Refugee, the 1951 Geneva Convention and the Treaty of Amsterdam', in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001), pp. 141–159. (version updated mainly in relation to the EU Charter of Fundamental Rights).

J. McAdam, 'The Qualification Directive: An Overview', in Karin Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, (Nijmegen: Wolf Legal Publishers, 2007).

- F. Nicholson, 'Challenges to Forging a common European Asylum System in line with the International Obligations', in *Peers and Rogers, EU Immigration and Asylum Law* (Leiden/Boston, Martinus Nijhoff Publishers, 2006), pp. 505–537.
- G. Noll, 'Access to Protection under the EU Acquis', in G. Noll, *Negotiating Asylum*, (The Hague: Martinus Nijhoff Publishers, 2000), pp. 233–244.

### Extended

Hélène Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', *International Comparative Law Quarterly*, vol. 55, no. 1 (January, 2006), pp. 161–192.

## ii. Minimum Standards for Normal Procedures

### Main Debates

What Constitutes Appropriate Minimum Standards?

Harmonisation of Standards v. Deference to State Law, Policy and Practice

Rights of Vulnerable Applicants to Procedural Protections (e.g. Separated Children, Traumatized Asylum-Seekers)

### Main Points

Low Level of Minimum Standards

Safeguards

Appeals

Remedies

### EU Documents

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326, 13 December 2005.

Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures, OJ C274, 19 September 1996.

'Communication from the Commission to the Council and the European Parliament "A More Efficient Common European Asylum System: The Single Procedure as the Next Step"', COM (2004) 503, 15 July 2004.

### UNHCR Documents

UNHCR ‘Summary of UNHCR’s Provisional Observations on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)’, March 2005.

### Readings

#### Core

R. Byrne, ‘Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures’, *European Journal of Migration and Law*, vol. 7, no. 1 (2005), pp. 71 – 86.

J. van der Klaauw, ‘Towards a Common Asylum Procedure’, in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Hart, 2001), pp. 165–194.

Immigration Law Practitioners Association (ILPA), ‘Analysis and Critique of Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (30 April 2004)’, July 2004.

### iii. Minimum Standards for Specific Procedures

#### *a. Accelerated and Manifestly Unfounded Procedures*

#### Main Debates

Efficient v. Fair Procedures

#### Main Points

Contrast between UNHCR and EU Definition of ‘Manifestly Unfounded’ Claims  
Abridged Safeguards

Shifts in the Standard and Burden of Proof

Procedural and Formal Grounds (as Opposed to Grounds Related to the Merits)  
for Channeling Claims into Accelerated Procedures

#### Soft Law

UNHCR EXCOM, ‘The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum’, Conclusion No. 30 (XXXIV), 1983.

UNHCR EXCOM, ‘Determination of Refugee Status’, Conclusion No. 8 (XXVIII), 1977.

### EU Documents

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status OJ 326, 13 December 2005 Arts. 23, 28, 34, 35, 39.

Resolution on Manifestly Unfounded Applications for Asylum, Conclusions of the Meeting of the Ministers responsible for Immigration Doc. 10579/92 IMMIG (London 30 November–1 December 1992).

Council Resolution of 20 June 1995 on Minimum Guarantees for Asylum Procedures OJ 274, 19 September 1996.

### UNHCR Documents

UNHCR, 'Position on Manifestly Unfounded Applications for Asylum', in *3rd International Symposium on the Protection of Refugees in Central Europe 23–25 April 1997, UNHCR Budapest, UNHCR European Series*, vol. 3 (Geneva: UNHCR, 1997), pp. 397–399.

UNHCR, 'An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR', *UNHCR European Series*, vol. 1, No. 3 (Geneva: UNHCR, 1995).

### Readings

#### Core

R. Byrne, 'Future Perspectives: Accession and Asylum in an Expanded European Union. Manifestly Unfounded Claims', in R. Byrne, G. Noll, and J. Vedsted-Hansen (eds), *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (The Netherlands: Kluwer Law International, 2002), pp. 403–408.

S. Mullally, 'Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determination' Irish Refugee Council, September 2001, Ch. 2, 4 (59–65), 5.

#### Editor's note

*A discussion of accelerated and manifestly unfounded procedures should also consider their relationship to the notions of safe third country and safe country of origin.*

*A consideration of procedural safeguards should consider issues such as, inter alia, legal representation, oral hearings, and appeals, with and without, suspensive effect.*

## *b. Safe Country of Origin*

### Main Debates

Does the Safe Country of Origin Notion Undermine the Right to have a Claim Assessed Individually?

### Main Points

Safe Country of Origin Notion:

As a Bar to Access to Procedures

As a Rebuttable Presumption of Unfoundedness of Claim

‘White Lists’ of Safe Countries of Origin

Need for Individual Assessment of Claims

Criteria for Designating Countries as ‘Safe’

### EU Documents

Conclusion on Countries in Which There is Generally No Serious Risk of Persecution, Conclusions of the Meeting of the Ministers responsible for Immigration, Doc. 10579/92 IMMIG (London, 30 November–1 December 1992).

### EU Instruments

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ 326, 13 December 2005 Arts. 23 (4) (c), 29, 30, 31, Annex II.

### Readings

#### Core

- R. Byrne and A. Shacknove, ‘The Safe Country Notion in European Asylum Law’ *Harvard Human Rights Journal*, vol. 9 (Spring 1996), pp. 190–196.
- C. Costello, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’, *European Journal of Migration and Law*, vol. 7, no. 1 (2005), pp. 35–70.
- H. Martenson and J. McCarthy, ‘Field Report. “In general no serious risk of persecution” safe country of origin practices in nine European states’ *Journal of Refugee Studies*, vol. 11, no. 3 (September 1998), pp. 304–325.

ECRE, 'Broken Promises-Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection', June 2004, pp. 10–12.

### iii. Minimum Standards for Reception Conditions

#### Main Debates

Has the EU Set an Adequate Standard for Reception Conditions?

#### Main Points

Purposes of EU Power over Reception Conditions

Objectives of Directive 2003/9

Level of Obligations in Directive

Exceptions from Obligations

Application of the directive to particular groups: asylum seekers in detention; those under Dublin II

#### UNHCR Documents

'UNHCR Annotated Comments on Council Directive 2003/9/EC of 27 January 2003, Laying Down Minimum Standards for the Reception of Asylum Seekers', July 2003.

#### Readings

##### Core

E. Guild, 'Seeking asylum: storm clouds between international commitments and EU legislative measures', *European Law Review*, vol. 29, no. 2 (2004), pp. 198–218.

N. Rogers, 'Minimum Standards for Reception', *European Journal of Migration and Law*, vol. 4, no. 2 (2002), pp. 215–230.

##### Editor's note

*Is the Directive Likely to Raise Standards Anywhere?*

*What Disputes Might Arise Concerning its Interpretation?*

*What are the Consequences (Legal And Otherwise) of States'*

*Failure to Respect Their Obligations to Provide Minimum Reception Conditions in Practice?*

#### iv. Other Forms of Protection

##### Main Debates

Does Temporary Protection Threaten the 1951 Geneva Convention?

Are the Needs of Subsidiary Protection Beneficiaries Less Pressing Or Durable Than Those Of Refugees?

Is There a Justification for Giving Different Levels of Entitlements to Refugees and Subsidiary Protection Beneficiaries?

##### Main Points

Relationship Between Directive and Refugee Determination Process

Diminished Rights Under the EC Temporary Protection Regime Compared with 1951 Geneva Convention Rights

##### Readings

###### Core

- H. Battjes, 'Briefing Note on European Protection in Cases of Group Persecution', IPOL/C/LIBE/FWC/2005-23-SC1, August 2006.
- H. Battjes, 'Subsidiary Protection and Reduced rights', in Karin Zwaan (ed.) *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2007), pp. 49–55.
- M. Gil-Bazo, 'Refugee status, subsidiary protection, and the right to be granted asylum under EC law', *UNHCR Research paper No.136*, November 2006
- B. Nagy, 'Is There a Need for Subsidiary Protection in Europe? A View from a Candidate Country', in D. Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels Bruylant, 2002), pp. 95–116.
- J. Vedsted-Hansen, 'Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law', in D. Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the 1951 Geneva Convention?* (Brussels: Bruylant, 2002), pp. 57–78.

##### EU Instruments

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons

as refugees or as persons who otherwise need international protection and content of the protection granted, OJ L 304, 30 September 2004.  
Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L212, 7 July 2001.

### UNHCR Documents

UNHCR, 'Comments on the proposal for Directive of the Council':  
Doc 11620/00, September 2000.

### Readings

#### Core

K. Kerber, 'The Temporary Protection Directive', *European Journal of Migration and Law*, vol. 4, no. 2 (2002), pp. 193–214.

### Editor's note

*See the section on other forms and instruments of protection after the 1951 Convention (Section II.3), in particular the article of Jane McAdam in Section II.3.b.*

*In the absence of using the EC process, national schemes could be established.*

*Compare the substantive rights for a person in an EC Temporary Protection regime with those for asylum seekers provided for in the Directive on Reception Conditions, on the one hand, and those for refugees provided for in the Geneva Convention and the Qualification Directive.*

## **v. Leaving Territory**

### **(a) Return Policies**

#### Main Debates

Is there Adequate Protection for Rejected Asylum-Seekers in order to Ensure that  
Return Policies do not Infringe the Non-Refoulement Principle?

#### Main Points

Use of Protection Mechanisms to Delay Expulsion or Removal



### EU Documents

Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, COM (2005) 391, 1 September 2005.

‘Green Paper on a Community Return Policy on Illegal Residents’, COM (2002) 175, 10 April 2002.

‘Commission communication on a Community return policy on illegal residents’, COM(2002)175, 10 April 2002.

‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions “Study on the links between legal and illegal migration”’, COM (2004) 412, 4 June 2004.

‘Communication from the Commission to the Council, the European Parliament, in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings external borders and the return of illegal residents’, COM (2003) 323, 3 June 2003.

Council Directive (EC) 2003/110 on assistance in cases of transit for the purposes of removal by air, OJ L 321/26, 6 December 2003.

### Soft Law

UNHCR EXCOM, ‘Conclusion on the Return of Persons Found Not to Be in Need of International Protection’, Conclusion No. 96 (LIV), 2003.

### Readings

#### Core

R. Cholewinski, ‘European Union Policy on Irregular Migration: Human Rights Lost?’, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), Part III, 9.

C. Rodier, ‘Analysis of the external dimension of the EU’s asylum and immigration policies’, *Summary and Recommendations for the European Parliament*, DGExPo/B/PolDep/ETUDE/2006\_11, PE 374.366, 8 June 2006.

### Extended

Consortium of 13 NGOs, including Cimade (France), Amnesty International EU, Churches' Commission for Migrants in Europe, Caritas Europa, Human Rights Watch and others, 'Common Principles on Removal of Irregular Migrants and Rejected Asylum Seekers', August 2005.

ECRE, 'Comments from the European Council on Refugees and Exiles on the Commission Green Paper on a Community Return Policy on Illegal Residents (Brussels, 10. 04. 2002, COM(2002)175 final)', August 2002.

### Editor's note

*Note the practical relevance of these policies for rejected asylum-seekers and persons whose refugee status or Subsidiary Protection/Temporary Protection status has ceased.*

## **(b) Readmission Agreements**

### Main Debates

Are the "Safeguard" Provisions in Readmission Agreements Sufficient

### Main Points

Objectives of Readmission Agreements:

- EU Seeking to Use Readmission Agreements to Guarantee Removal Of Irregular Migrants, Including Those Who Have Merely Transited Through Other Contracting Party
- Rules on Proof and Presumptive Evidence for Nationality and Transit Route
- Safeguard Clauses

### EU Documents

Proposal for a Council Decision on the signature of the Agreement between the European Community and Ukraine on the Readmission of Persons, COM(2007) 0197.

Proposal for a Council Decision concerning the conclusion of the Agreement between the European Community and Bosnia and Herzegovina on Readmission of Persons Residing without Authorisation, COM(2007) 0425.

Proposal for a Council Decision on the signature of the Agreement between the European Community and the Republic of Montenegro on Readmission of Persons Residing without Authorisation, COM(2007) 0431.

Proposal for a Council Decision on the signature of the Agreement between the European Community and the Former Yugoslav Republic of Macedonia on Readmission of Persons Residing without Authorisation, COM(2007) 432.

Proposal for a Council Decision on the signature of the Agreement between the European Community and Serbia on Readmission of Persons Residing without Authorisation, COM(2007) 0438.

### EU Instruments

Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the European Community on the Readmission of Persons Residing without Authorisation, OJ L 17, 24 January 2004.

Agreement between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorization, OJ L 124, 17 May 2005.

Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation, OJ L 143/97, 30 April 2004.

Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorisation: OJ L 124, 17 May 2005.

Agreement between the European Community and the Russian Federation on Readmission, OJ L 129, 17 May 2007.

### Readings

#### Core

D. Bouteillet-Paquet, 'Passing the Buck: a critical analysis of the readmission policy implemented by the European Union and its Member States', *European Journal of Migration and Law*, vol. 5, no. 3 (2003), pp. 359–377.

M. Schieffer, 'Community readmission agreements with third countries – objectives, substance and current state of negotiations', *European Journal of Migration and Law*, vol. 5, no. 3 (2003), pp. 343–357.

### Extended

N. A. Abell, 'The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees', *International Journal of Refugee Law*, vol. 11, no.1 (January 1999), pp. 60–83.

IGC Secretariat, 'Report on Readmission Agreements', June 2000.

### Editor's note

*Readmission agreements will apply to rejected asylum seekers and to people removed to supposedly safe third countries and safe countries of origin. But query whether readmission agreements concluded by the EC to date do contain adequate safeguards to ensure that people in need of international protection are not returned to persecution.*

## **vi. Co-operation and Responsibility/Burden-Sharing**

### Main Debates

Burden Shifting v. Burden-Sharing

### Main Points

Is Financial Burden-Sharing Effective or are Other Forms of Cooperation Required Amongst Member States?

Modest Degree of Funding Provided for the Review of the European Refugee Fund Planned after Enlargement.

### EU Instruments

Proposal for a Council Directive amending Directive 2003/109/EC to extend its scope to beneficiaries of international protection, COM (2007) 298, 6 June 2007.

Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007–2013, COM (2005) 123, 6 April 2005.

### UNHCR Documents

UNHCR, 'Observations on the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation – New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System, (COM (2006) 67, 17 February 2006)', April 2006.

## Readings

### Core

- R. Byrne, 'Harmonization and Burden Redistribution in the Two Europes' *Journal of Refugee Studies*, vol. 16, no. 3 (September 2003), pp. 336–358.
- E. Thielemann, 'Towards Refugee Burden-Sharing in the European Union State Interests and Policy Options', *Ninth Biennial International Conference of the European Union Studies Association*, 31 March–2 April 2005.
- ECRE, 'Information Note on the Council Decision Establishing the European Refugee Fund for the Period 2005–2010', December 2004.

### Extended

- E.R. Thielemann, 'Between Interests and Norms: Explaining Burden-Sharing in the European Union', *Journal of Refugee Studies*, vol. 16, no. 3 (September 2003), pp. 253–273.

## **(a) European Refugee Fund**

### Main Debates

Burden Shifting v. Burden Sharing

### Main Points

- Is financial burden-sharing effective or are other forms of cooperation required amongst Member States?
- Is the Distribution Criteria Appropriate? (ie. States with Largest Asylum Seeker Numbers Receive Greatest Proportion of Funds).

### EU Instruments

Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC, OJ L 144, 6 June 2007.

'Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007–2013. Proposal for a Decision of the European Parliament and the Council establishing the European Refugee

Fund for the period 2008–2013 as part of the General programme “Solidarity and Management of Migration Flows”, COM (2005) 123, 6 April 2005.

*Readings*

ECRE, Comments by the European Council on Refugee and Exiles on the Commission Proposal for a Council Decision establishing the European Refugee Fund for the period 2005–2010, March 2004.

## SECTION IV

### UNHCR and Other Actors Relevant to International Asylum Law

#### Editor's note

*See also Section I.2, on Institutions and Actors in international law relevant to refugee protection for a brief introduction and basic readings.*

*UNHCR has changed its perceived mission several times, first extending protection to victims in situations not falling under its original mandate and second by becoming an agency involved in complex humanitarian missions in acute conflict zones.*

*This extended responsibility could not be discharged without an ever growing co-operation with other member organizations and programs of the UN family and without the expanding engagement of national and international non-governmental organizations as implementing partners.*

*The outreach of the UN-centered refugee regime depends on its precarious relationship with the major donor governments.*

*UNHCR strives to redefine itself through the global consultations, the “Convention Plus” approach and the Agenda for Protection.*

#### Readings

##### Core

W. Kälin, ‘Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond’, in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.

## 1. UNHCR

#### Main Debates

Should the Role of UNHCR Extend Beyond Protection to Include Humanitarian Aid, and/or Return and Reconstruction

## UNHCR's Expansive Role in Status Determination and the Procedural Standards Applied

Has, and Can, UNHCR Put Up Effective Resistance Against Restrictive Tendencies in Europe and Elsewhere?

### Main Points

UNHCR Conducts Status Determination in Over 70 Countries with Significant Variations in Practice and Standards

Necessity of Networks for Co-operation and Engagement

Dependency on Major Donor Governments

Global Consultations

Convention Plus

Agenda for Protection

### Treaties

#### International

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.

Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267.

### Soft Law

Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution, A/RES/428 (V), 14 December 1950.

### UNHCR Documents

UNHCR, 'Declaration Reaffirming the Principles of the 1951 Refugee Convention', December 2001.

REFWORLD, the UNHCR's CD-ROM Database (2005).

UNHCR, 'Agenda for Protection', October 2003.

UNHCR, 'Procedural Standards for Refugee Status Determination Procedure under UNHCR's Mandate', September 2005.

### Readings

#### Core

B.S. Chimni, 'The Geopolitics of Refugee Studies: A View from the South', *Journal of Refugee Studies*, vol. 11, no. 4 (December 1998), pp. 350–357, 365–368.



- G. Gilbert, 'Rights, Legitimate Expectations, Needs and Responsibilities: UNHCR and the New World Order', *International Journal of Refugee Law*, vol. 10, no. 3 (July 1998), pp. 350–388.
- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 20–32. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 7–17].

### Extended

- M. Barutciski, 'A Critical View on UNHCR's Mandate Dilemmas', (*International Journal of Refugee Law*, vol. 14, nos. 2–3 (April 2002), 365–381.
- W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.
- G. Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford: Oxford University Press, 2001).

## **2. Other Agencies and Their Interaction**

### Readings

#### Core

- G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), pp. 441–446. [G. Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1996), pp. 222–230].
- C. Phuon, 'Improving United Nations Response to Crises of Internal Displacement', *International Journal of Refugee Law*, vol. 13, no. 4 (October 2001), pp. 491–517.

#### Extended

- W. Kälin, 'Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond', in E. Feller, V. Türk, and F. Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), pp. 613–666.

A. Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (The Hague: Martinus Nijhoff Publishers, 2002), pp. 118–138.

Editor's note

*Note also the activities of agencies not fully covered in the readings, among them the UN Security Council's resolutions referring to situations producing flight of persons, on the involvement of IOM and the ICRC.*

## NOTES ON THE EDITORS

### **Rosemary Byrne**

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Rosemary Byrne is a Senior Lecturer in International Law at Trinity College Dublin and a Human Rights Commissioner at the Irish Human Rights Commission. She has worked extensively with non-governmental organizations and is the director of the International Process and Justice Project, a founding member of the Refugee Policy Protection Group, as well as the Secretary of the Irish branch of the International Law Association. She has been a Government of Ireland Research Fellow and a Visiting Fellow at the Harvard Law School Human Rights Programme. Her research is in the areas of comparative refugee law and policy and international criminal law. She earned her bachelor's degree from Barnard College, Columbia University and her J.D. from Harvard Law School.

### **Bhupinder Chimni**

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B.S. Chimni is Professor at Jawaharlal Nehru University, New Delhi and is the author of *International Refugee Law: A Reader*, one of the main international textbooks in the field. His areas of expertise include international law, international trade law and international refugee law. He served for three years as Vice Chancellor of the W.B. National University of Juridical Sciences and has been a Visiting Professor at the International Center for Comparative Law and Politics, Tokyo University, a Fulbright Visiting Scholar at Harvard Law School, Visiting Fellow at the Max Planck Institute for Comparative and Public International Law, Heidelberg, and a Visiting Scholar at the Refugee Studies Center, York University, Canada. He served as a member of the Academic Advisory Committee of the Office of the United Nations High Commissioner for Refugees for the period from 1996–2000. He is on the editorial board of several national and international journals including the *Indian Journal of International Law*, *International Studies*, *International*

Refugee Studies, Georgetown Immigration Law Journal & Refugee Survey Quarterly. Professor Chimni is part of a group of scholars who self-identify as the Third World Approaches to International Law (TWAIL) scholars.

### **Maryellen Fullerton**

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Maryellen Fullerton earned her bachelor's degree at Duke University, pursued graduate studies in Psychology at the University of Chicago, and then studied Law at Antioch School of Law, from which she received her J.D. degree. After her law studies she worked as a judicial clerk for Judge Frank M. Johnson, Jr., Chief Judge, United States District Court for the Middle District of Alabama, and then served as a judicial clerk for Judge Francis L. Van Dusen, United States Court of Appeals for the Third Circuit. She joined the faculty of Brooklyn Law School in New York in 1980, where she has been a professor of law since 1985. She has co-authored leading academic texts, *Forced Migration: Law and Policy* (2007) and *Immigration and Citizenship Law: Process and Policy* (6th edn. 2007), as well as numerous articles on comparative refugee law. She has been a Visiting Professor of Law at the University of Louvain in Belgium and a Fulbright Scholar researching asylum policies in Belgium, Germany, Denmark, and the Netherlands. She has also been a German Marshall Fund Fellow, researching refugee law and asylum policy in Hungary, Poland, and the Czech Republic and a Visiting Scholar at the Center for Advanced Studies in Social Sciences of the Juan March Institute in Madrid. In addition to her academic research, she has served as a rapporteur for Human Rights Watch/Helsinki on several human rights fact-finding missions to Germany. She has been active in the International Law Association on the Committee on Internally Displaced Persons and on the Committee on Refugee Law (American Branch). For her work with law students representing asylum seekers, she was awarded the Migration and Refugee Services' Volunteer Service Award for Assistance to Refugees.

## **Madeline Garlick**

*UNHCR Brussels, Belgium*

Madeline Garlick studied at Monash University, Melbourne, Australia, where she obtained an LL.B.(Honours) in general law and B.A.(Honours) in politics and German language and literature. She later read law at Queens' College, Cambridge, UK, from which she graduated with an LL.M., after writing a thesis on the compatibility of the national asylum legislation of different countries and international refugee and human rights law. She is qualified as a barrister and solicitor in Victoria, Australia, where she has practiced in various legal fields, including advice and representation for asylum seekers and refugees in Australia. In her work for Justice, UK, she lead research and prepared the 1997 report entitled 'Providing Protection', on the UK asylum procedure. She worked for three years in Bosnia and Herzegovina, for the Commission for Real Property Claims of Displaced Persons and Refugees and for the Office of the High Representative. Subsequently, she worked for the United Nations Peacekeeping Force in Cyprus (UNFICYP), including as a member of the Secretary-General's negotiating team, which sought to facilitate a resolution to Cyprus' political conflict, from 1999–2004. She is currently Senior EU Affairs Officer with the United Nations High Commissioner for Refugees (UNHCR) in Brussels, in charge of liaison with the EU institutions. Madeline Garlick serves as an Editor in her personal capacity, and the views expressed or implied in the Reader do not necessarily represent the position of the United Nations or UNHCR.

## **Elsbeth Guild**

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Elsbeth Guild studied classics in Canada and Greece and law in London. She defended her thesis on European Community immigration law at the University of Nijmegen, where she now is the Professor of European Immigration Law. She is also a partner in the immigration department at the London law firm, Kingsley Napley. She teaches at Sciences Po in Paris and is a Visiting Fellow at the London School of Economics. She has published widely in the field of immigration and asylum law and policy in Europe. Her

monograph, Immigration Law in the European Community, remains a basis text in the field. Professor Guild is the UK member of the Odysseus Network of academic experts in European Immigration and Asylum Law. She is frequently invited to advise both the European Commission and the Council of Europe on immigration and asylum issues.

**Lyra Jakulevičienė**

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Lyra Jakulevičienė is an Associate Professor at Mykolas Romeris University in Lithuania and has almost ten years of teaching experience in international law (human rights, refugee and treaty law in particular). She served in the capacities of Legal Adviser and later as Liaison Officer of the United Nations High Commissioner for Refugees in Lithuania in 1997–2003 and lately as the Head of United Nations Development Programme in Lithuania. Her international experience includes participation in the Söderköping process where she was responsible for the establishment and management of a Cross Border Cooperation Secretariat in Kiev, Ukraine in 2003. In this capacity Ms. Jakulevičienė has been working on facilitation and promotion of co-operation among ten countries in the Western CIS and the Central European/Baltic region on migration, asylum and other cross-border related issues, as well as on bridging the implementation of the UN priorities and strategies with the changing environment due to the EU enlargement process in the countries on both sides of the future EU external borders. She is a Doctor of Social Sciences (law) and an author of a dozen of articles on refugee protection, as well as the first book in Lithuania on the rights of refugees, and is a member of the Odysseus Academic Network in Europe.

**Boldizsár Nagy**

*ELTE University, Hungary*

Boldizsár Nagy read law and philosophy at the Eötvös Loránd University and pursued international studies at the Johns Hopkins University Bologna Center. Besides the uninterrupted academic activity both at the Eötvös Loránd University International Law Department (since 1977) and the

Central European University (since 1990) he is counsel for Hungary in the Gabčíkovo-Nagymaros Project case pending before the International Court of Justice, and has acted several times as an expert for the Hungarian Ministry for Foreign Affairs and the Council of Europe. The Directorate of Refugee Affairs of the Hungarian Office for Nationality and Immigration Affairs and UNHCR Branch Office in Budapest maintain close contacts with him. He is also involved in the work of three leading Hungarian NGOs (Menedék, Helsinki Committee and NEKI) representing the interests of forced migrants and other victims of discrimination. In 2001 he was awarded the Menedék Prize of UNHCR for his contribution to refugee protection. He has published widely in the area of refugee and international law and is on the editorial boards of the *International Journal of Refugee Law* and of the *European Journal of Migration and Law*.

### **Luis Peral**

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Luis Peral holds a Ph.D. in Law, M.A. in Law of the European Union, M.A. in Political Sciences – International Relations (Universities Complutense and Carlos III of Madrid), and Diploma in English Law (University of Kent, Canterbury, UK). He currently works at the Center for Constitutional Studies of the Minister of the Presidency under the Ramón y Cajal Research Program of the Spanish Government, and is also the Director of the Conflict Prevention and Resolution Programme of the International Center of Toledo for Peace (CITpax). From September 1992 to September 2004, he taught Public International Law at the Law Faculty of the University Carlos III of Madrid, where he organised a Masters Course on Cooperation to Development, Migration and Humanitarian Action. Between 2004 and 2006 he worked as Senior Research Fellow at FRIDE. He has been Visiting Scholar at the University of Michigan Law School, and a lecturer at several universities and institutions, such as the International Institute of Humanitarian Law (Sanremo, Italy) and the European Master Course on Democratization and Human Rights of the European Inter-University Center (Venice). He is also Director of the Cuenca Colloquium on International Refugee Law. His research and publications, particularly, “Éxodos masivos, supervivencia

y mantenimiento de la paz”, are focused on International Refugee Law, Humanitarian Law, European Human Rights Law, Peacekeeping and Peace building, UN Reform, as well as Migration and Development.

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Jens Vedsted-Hansen earned his LL.M and LL.D. from the University of Aarhus, where he is a Professor of Law. Having worked as a research scholar at the University of Aalborg, Faculty of Social Sciences, and as assistant and associate professor at the University of Aarhus Law School, he became a research fellow at the Danish Centre for Human Rights in 1993. In 1997 he joined the Faculty of Law at the University of Copenhagen as an associate professor. Since 1999 he has been a professor of human rights law at the University of Aarhus Law School. He has participated in various international research projects as a contributor, commentator or panel member. He is a member of the Odysseus Academic Network of Legal Studies on Immigration and Asylum in Europe, and of the editorial board of *European Journal of Migration and Law*. He served as a member of the Danish Refugee Appeals Board from 1987 to 1994. His research interests include administrative law, immigration and refugee law, and human rights law.



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### Tímea Szabó

#### *Hungarian Helsinki Committee*

Tímea Szabó graduated from Hungary's József Attila University of Sciences and studied comparative refugee law at Harvard Law School. Before joining the Hungarian Helsinki Committee to coordinate the organization's refugee program, she worked in Afghanistan and Pakistan for various international organizations, including CARE International and the International Rescue Committee. Her focus was on human rights, human security and refugee protection. Prior to that, she worked as research coordinator at a human security program of Harvard University, researching conflict prevention strategies and the protection of civilians in conflict areas. Before joining Harvard, she was a Budapest-based journalist, writing for a number of U.S. and British newspapers, magazines and newswires.

### Syed Qadri

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Syed Qadri earned his political science degree at York University, specializing in policy and human rights development. He joined the Hungarian Helsinki Committee through Human Rights Internet that is sponsored by the Canadian International Development Agency and is part of NetCorps Canada, an international development program. Before he joined the Hungarian Helsinki Committee, he volunteered with Rooftops Canada focusing on various development projects and resource building. He also worked at York University, at the Office of the Ombudsperson & Centre for Human Rights as a researcher and case analyst. His work also involves grassroots initiatives for the community, such as local food drives for the homeless and blood drives.

